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Supreme Court of the United States

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THERESA MARTIN,

Petitioner,

v.

SHAW'S SUPERMARKETS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a state workers compensation statute that permits parties to collectively bargain to opt-out of certain of the statute's terms, require pre-emption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, of any claim against a unionized employer because the employer asserts that the collective bargaining agreement may provide a defense to the claim?

II.Are a state's statutory protections for individual attempting to return to employment from industrial injury enforceable by former members of a collective bargaining unit, or, as to such persons, are those protections pre-empted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, whenever a defendant asserts a defense based on the existence of a collective bargaining agreement?

III. Can a state law claim for protection filed exclusively under a state worker's compensation statute, by a plaintiff who is neither covered by a collective bargaining agreement, nor a member of the collective bargaining unit at the time her state law claims arose, be removed to federal court by the defendant's mere invocation of the existence of a collective bargaining agreement?

IV. Does pre-emption under Section 301 of the Labor management Relations Act pre-emption, 29 U.S.C. § 185, properly apply to remove, and extinguish the state law claims of a plaintiff, thereby leaving her with no remedy, as she was neither covered by a collective bargaining agreement, nor was a member of a collective bargaining unit at the time her state law claims arose?

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PETITION FOR WRIT OF CERTIORARI

Theresa Martin respectfully prays that a writ of certiorari issue, to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on January 28, 1997, in order to resolve the conflict between the First Circuit's opinion in this important matter, and decisions of other United States courts of appeal on this same matter, and in order to resolve the conflict between the First Circuit's opinion and applicable decisions of the Supreme Court.

OPINIONS BELOW

The opinion of the United States First Circuit Court of Appeals that gives rise to this petition, held that the Plaintiff's state law claim for rights and protection under Massachusetts General Laws, Chapter 152, Sections 75A and 75B, (the Massachusetts workers' compensation statute), was pre-empted by Section 301 of the Labor Management Relations Act. 29 U.S.C. §185(a). The opinion is reported at 105 F.3d 40 (1997). It is reproduced in the Petitioner's Appendix at pages 1a to 11a. The decision of the United States District Court for the District of Massachusetts, which denied Theresa Martin's Motion to Remand to the Massachusetts Superior Court, and which granted Shaw's Motion to Dismiss, is unreported and is reproduced in the Appendix at pages 12a to 15a.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on January 28, 1997. The Plaintiff filed a Petition for Rehearing or Rehearing En Banc on February 21, 1997, which Petition was denied by the Court, as to both requests, on February 28, 1997. The Court of Appeals had jurisdiction in this matter pursuant to 28 U.S.C. §1291. The Petitioner invokes the jurisdiction of the Court under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1445(c). Nonremovable Actions.

> **A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.**

29 U.S.C. §185(a). Suits By and Against Labor Organizations.

> **Suits for violation of contracts between an employer and an labor organization representing employes in an industry affecting commerce as defined in this chapter, or beween any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties.**

Massachusetts General Laws, Chapter 152, Section 75A. Preferences for Hiring.

> **Any person who has lost a job as result of an injury compensable under this chapter shall be given preference in hiring by the employer for whom he worked at the time of compensable injury over any persons not at the time of application for**

reemployment employed by such employer; provided, however, that a suitable job is available. Action may be filed under this section with the superior court department of the trial court for the county in which the alleged violation occurred. An employer found to have violated this section shall be exclusively liable to pay to the employee lost wages, shall grant the employee a suitable job, and shall reimburse such reasonable attorney fees incurred in the protection of rights granted by this section as shall be determined by the court.

In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement or chapter thirty-one, the collective bargaining agreement or said chapter thirty-one shall prevail.

Massachusetts General Laws, Chapter 152, Section 75B. Qualified handicapped persons; discrimination against employees exercising rights under this chapter.

(2) No employer or duly authorized agent of an employer shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by this chapter, or who has testified or in any manner cooperated with an inquiry or proceeding pursuant to this chapter, unless the employee knowingly participated in a fraudulent proceeding. Any person claiming to be aggrieved by a violation of this section may initiate proceedings in the superior court department of the trial court for the county in which the alleged violation occurred. An employer found to have violated this paragraph shall be exclusively liable to pay to the employee lost wages, shall grant the employee suitable employment, and shall reimburse such reasonable attorney fees incurred in the protection of rights

granted as shall be determined by the court. The court may grant whatever equitable relief it deems necessary to protect rights granted by this section.

(3) In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail. An employee may not otherwise waive rights granted by this section.

STATEMENT OF THE CASE

Facts.

Petitioner Theresa Martin ("Martin"), a 52 year-old woman who had worked for sixteen years for defendant Shaw's Supermarkets, Inc. ("Shaw's" or "the Company") until her termination due to a work-related injury, brought this action in Bristol County Superior Court of the Commonwealth of Massachusetts pursuant to the Massachusetts Workers' Compensation Law, Massachusetts General Laws chapter ("Mass. Gen. L. ch.") 152, §§ 75A and 75B(2). Appendix (App.) 122a-124a. In her state complaint, Martin challenged Shaw's' refusal to rehire her after her recovery from her injury and sought damages for the Company's retaliatory and discriminatory conduct in refusing to rehire her. Upon the defendant's removal of the action to federal court, the district court, affirmed by the Court of Appeals, held that all of Martin's claims were pre-empted by the Labor Management Relations Act.

Martin began working for Shaw's in 1979. App. 2a. While employed by Shaw's, Martin was a member of Local 791 of the United Food and Commercial Workers Union, AFL-CIO, CLC ("Local 791" or "the Union") and was covered by the collective bargaining agreement between the Union and Shaw's Supermarkets, Inc.,

Southern Region, (hereinafter "the Collective Bargaining Agreement"). App. 17a-117a.

On or about August 25, 1994, while working as a bakery clerk, Martin permanently injured her back. App. 2a. On September 16, 1994, Martin began receiving workers' compensation benefits for temporary total disability under Mass. Gen. L. chapter 152, § 34. App. 2a. Martin's employment with Shaw's was terminated effective September 13, 1995, pursuant to the Company's policy and the Collective Bargaining Agreement's provision that any full-time employee absent from work for one year is separated from Shaw's employment. App. 3a. Martin does not contest her discharge by the Company.

At the time of her termination of employment, Martin lost all rights under the Collective Bargaining Agreement, including any seniority rights, and all of her company benefits. App. 20a. As a terminated employee, Martin was no longer covered under the collective bargaining agreement, a fact Martin does not contest. App. 20a. Nothing in Shaw's Collective Bargaining Agreement with Local 791 addresses the rehiring of former employees terminated pursuant to the above-referenced provision, the rehiring of employees who left employment due to a work-related injury, or the rehiring of former employees under any other circumstances. App. 17a-117a.

On October 19, 1995, Martin applied for reemployment at Shaw's. App. 3a. Martin indicated on her application that, consistent with her physician's restrictions, she could work full-time as a bakery clerk or in other store departments. Id. Martin indicated she was available for work at that time. Id. Shaw's did not respond, has not since responded, and has not rehired Martin. Id.

The District Court Proceedings

Shaw's filed a Notice of Removal in Bristol County Superior Court on March 1, 1996. On March 13, 1996, Shaw's filed a Motion to Dismiss or, in the alternative, for summary judgment, and contended Martin's action was completely preempted by section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185. Martin opposed both motions and moved the court to remand for lack of subject matter jurisdiction. App. 13a.

By decision dated June 20, 1996, the District Court for the District of Massachusetts (Lasker, D.J.) allowed Shaw's Supermarket, Inc.'s Motion to Dismiss and denied Martin's Motion to Remand. App. 12a-15a. The district court judge stated:

> Martin is correct that the provisions of the CBA in the present case do not clearly delineate whether an injured employee who has been dismissed has a right to be rehired. However, Shaw's contention, that several of the CBA provisions "could be construed to govern" the plaintiff's claims, is more persuasive ... Martin's claims are pre-empted by section 301(a). Accordingly, it is for an arbiter to determine either 1) whether the CBA affords a right to be rehired or 2) whether the existing provisions of the CBA in fact apply to Martin's claims.

App. 15a.

The First Circuit's Decision On Appeal

On July 18, 1996, Martin filed an appeal with the United States Court of Appeals for the District of Massachusetts, seeking reversal of the district court order

and an order to remand the matter to the state court from which it originated.

On January 28, 1997, the Court of Appeals affirmed the decision of the District Court. The First Circuit predicated its decision on "whether resolution of Martin's claims would require an interpretation of the collective bargaining agreement." The First Circuit found that the proviso in Massachusetts General Laws, Chapter 152, Sections 75A and 75B(3), which provides, "`in the event any right set forth in this section is inconsistent with an applicable collective bargaining agreement,' the agreement shall prevail" was in effect an element of Martin's state law claim, rather than an affirmative defense to be raised by the defendant. Following upon this construction, the Court relied upon a boiler-plate management rights clause to find "that under Supreme Court and First Circuit precedent, Martin's state law claims are pre-empted. "This is not because the collective bargaining agreement is inconsistent with the state claims asserted, but because it may be so and requires interpertation." (App.) 9a. With this ruling, the Court extinguished all of Martin's state law claims for preference in rehiring and for damages for retaliation and discrimination on account of her status as an injured worker, and her previous use of workers compensation benefits. Because she was not covered by the Collective Bargaining Agreement when she applied for reemployment, Martin had no access to the grievance-arbitration process to challenge Shaw's refusal to rehire her.

On February 21, 1997, Martin filed a Petition for Rehearing or Rehearing En Banc, which petition was denied on February 28, 1997. App. 16a. On May 17, 1997, Martin filed a Motion to extend the time for the filing of the Writ of Certiorari with the United States

Supreme Court until June 9, 1997; the motion was granted on May 22, 1997.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' RULING IN THIS CASE PERPETUATES A SPLIT IN THE CIRCUITS ON THE IMPORTANT MATTER OF SECTION 301 PRE-EMPTION OF STATE GRANTED EMPLOYMENT RIGHTS.

The central issue in this case is whether a state law granting certain rights to injured workers is completely pre-empted by the existence of a collective bargaining agreement that is silent on the subject matter of the statute, simply because the statute yields generally to "inconsistent" provisions, if any, of an applicable collective bargaining agreement. In a series of cases decided over the last decade, this Court has addressed the subject of federal pre-emption of state law claims asserted by members or former members of collective bargaining units, and has rejected the overreaching application of pre-emption embraced by the First Circuit here. Indeed, the First Circuit's application of pre-emption in the circumstances of this case has the anomalous result of depriving a citizen of her state granted rights or any remedy, solely because of her former participation in collective bargaining, and would likewise disenfranchise any current member of the collective bargaining unit because of the mere existence and thus "possible inconsistency" of a collective bargaining agreement. Because this decision is in conflict with decisions of other United States Courts of Appeals on this matter of importance to states and their workers, and because this decision conflicts with this Court's most recent decisions on the subject, this Court should grant a writ of certiorari

to the First Circuit for the purpose of resolving the continuing split in the Circuits concerning the proper reach of Section 301 pre-emption and in order to conform the First Circuit's pre-emption jurisprudence to that of this Court.

This case was foretold by this Court in a footnote to its most recent decision concerning pre-emption of state law claims by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 ("Section 301"). See, Livadas v. Bradshaw, 512 U.S. 107, 124, n. 18, 114 S.Ct. 2068, 2078, n. 18, 129 L.Ed.2d 93 (1994).[1] There, the Court noted:

> We are aware...that the Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in Lingle and Lueck[3]. But this case . . . is not a fit occasion for us to resolve disagreements that have arisen over the proper scope of our earlier decisions.

Id. Among the scenarios giving rise to invocations of pre-emption, this Court specified "the argument . . . that

[1] In Livadas, this Court held as pre-empted by federal law the California Labor Commissioner's policy construing state law to bar enforcement of California's wage payment statute if the terms and conditions of an employee's employment were governed by a collective-bargaining agreement providing for arbitration.

[2] Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) (finding no pre-emption of state tort action alleging termination in retaliation for filing a worker's compensation claim).

[3] Allis-Chalmers v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) (finding pre-emption of state tort action alleging bad faith handling of claim filed under collectively bargained disability plan).

a plaintiff's claim cannot be 'resolved' absent collective-bargaining agreement interpretation, i.e., that a term of the agreement may or does confer a defense on the employer (perhaps because the employee or his union has negotiated away the state law right) [citation omitted]." Id. Such is Shaw's contention, essentially adopted by the First Circuit, and this case thus provides "a fit occasion" for the Court to resolve the conflict and disarray among the Circuits on these issues of import to the States and the citizens they seek to protect. Indeed in seeking this petition for certiorari Martin, invokes this Court's counsel that "[h]olding the plaintiff's cause of action substantively extinguished may not . . . always be the only means of vindicating the arbitrator's primacy as the bargained for contract-interpreter. [Citation omitted]." Id.

The First Circuit's overbroad approach to pre-emption in this matter perpetuates the conflicts within the Circuits on at least two aspects of Section 301 pre-emption. First, the First Circuit's decision here conflicts squarely with the Seventh Circuit's treatment of state claims under a workers' compensation statute that, like Massachusetts' Workers' Compensation Law, expressly defers to the terms of a collective bargaining agreement, if present. See, Kohl's Food Stores v. State of Wisconsin and Hyland, 32 F.3d 1075, 1077 (7th Cir. 1994) (although statute provides that collective bargaining agreement governs in determining availability of suitable work, determination of whether suitable work available does not "turn upon" reading of the collective bargaining agreement for purposes of pre-emption). Despite this Court's recent (and consistent) guidance on the issue, the First Circuit, unlike the Seventh Circuit, persists in reading such a statutory provision to transform the "legal character" of any claim brought under the statute from one based on state-granted minimum employment standards to one founded on or dependent on analysis of

contractual rights, and thus wholly pre-empted and extinguished. See Livadas, 512 U.S. at 123, 114 S.Ct. at 2078 ("legal character" of claim determines whether state cause of action goes forward).

Second, and even more striking, moreover, the First Circuit's construction of such a proviso to transform an otherwise independent state claim into a dependent, and thus pre-empted, federal claim works an injustice of constitutional proportions, as this Court held in Livadas. In this regard, the First Circuit's application of pre-emption, like the Labor Commissioner's non-enforcement policy in Livadas, flowed from an "honest (though flagrant) mistake of law, [citation omitted]," Livadas, 512 U.S. at 116, n.10, 114 S.Ct. at 2074, n. 10. Otherwise stated, the First Circuit construed the state rule to require § 301 pre-emption with a result that "predicated benefits on refraining from conduct protected by federal labor law," a principle this Court found in Livadas to violate the policies of so-called Machinists [4]pre-emption precludes state action that acts either to encourage or discourage participation in the collective bargaining process. See, Metropolitan Life

[4] So-called Machinists pre-emption applies to protect against state interference with conduct intended by Congress in the LMRA to remain unregulated and thus subject to the free play of economic forces. Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). Otherwise stated, Machinists pre-emption precludes state action that acts either to encourage or discourage participation in the collective bargaining process. See, Metropolitan Life Insurance Company v. Massachusetts, 471 U.S. 724, 755, 105 S.Ct. 2380, 2397, 85 L.Ed.2d 728 (1985) (state law not pre-empted where it "neither encourage[s] nor discourage[s] the collective bargaining processes"); see also, Livadas, 512 U.S. at 117, n. 11, 114 S.Ct. at 2074-2075, n. 11.

Insurance Company v. Massachusetts, 471 U.S. 724, 755, 105 S.Ct. 2380, 2397, 85 L.Ed.2d 728 (1985) (state law not pre-empted where it "neither encourage[s] nor discourage[s] the collective bargaining processes"); see also, Livadas, 512 U.S. at 117, n. 11, 114 S.Ct. at 2074-2075, n. 11. pre-emption. At the same time the First Circuit ignored this Court's cautionary approach to extinguishing state law claims and its counselling of alternatives that uphold the policies and purposes of § 301 pre-emption. Livadas, 512 U.S. at 123-124, n. 17, n. 18, 114 S.Ct. at 2078, n. 17, n. 18.[5]

Finally, in finding all of Martin's state law claims pre-empted on the mere assertion that a collective bargaining agreement "may be" "inconsistent" with the state rights asserted, App. 9a (emphasis in original), the First Circuit continues the disarray among the Circuits as to whether a defendant may remove and extinguish a plaintiff's state law claims merely by articulating the possibility of a contractually-based defense. In this regard, the First Circuit is joined by the Eighth Circuit Court of Appeals, while the Second, Fourth, Fifth, Sixth, and Seventh have, since this Court's Livadas decision, issued opinions declining to pre-empt state claims based on employers' defensive assertions that contractual interpretation may defeat the plaintiff's claims. See, Davis v. Johnson Controls, Inc., 21 F.3d 866, 868 (8th Cir. 1994) (state handicap discrimination claim pre-empted where employer asserts contractual seniority provisions govern availability of position for plaintiff). Compare, Gay v. Carlson, 60 F.3d 83 (2d Cir. 1995) (no pre-emption of state tort claims by mandatory arbitration

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[5] This Court suggested the view that the proper course in such instances is not complete preemption, but rather state court application of federal law or, alternatively, referral of the contractual issue to an arbitrator. Livadas, 512 U.S. at 123-124, n.17, n.18, 114 S.Ct. 2078, n.17, n.18.

of disputes under Railway Labor Act, 45 U.S.C. § 181); Martin Marietta Corporation, Aero & Naval Systems v. Maryland Commission on Human Relations, 38 F.3d 1392 (4th Cir. 1994) (no pre-emption of state retaliatory discharge or failure to rehire claims despite collective bargaining agreement provisions on related subjects); Loewen Group International, Inc. v. Haberichter, 65 F.3d 1417, (7th Cir. 1995) (no pre-emption of state contract action under individual employment agreement despite employee defendant's assertion that collective bargaining agreement may conflict with individual employment contract); Hirras v. National Railroad Passenger Corporation, d/b/a/ Amtrak, 44 F.3d 278 (5th Cir. 1995) (on remand from this Court, no emphasis of state tort claim under Railway Labor Act).

The Conflict Over The Pre-emptive Effect, If Any, Of State Statutory Provisions Deferring To Collective Bargaining Agreements.

To find all of Ms. Martin's statutory claims for rehiring preference and non-retaliation pre-empted, the First Circuit relies expressly on the statute's proviso that "[i]n the event any right set forth in this section is inconsistent with an applicable collective bargaining agreement," the agreement shall prevail. App. 6a-7a, quoting, Mass. Gen. L. ch. 152, § 75A. The First Circuit stated,

> It is very doubtful whether, without this last-quoted proviso, Shaw's would have any plausible claim of federal preemption. Massachusetts has an independent interest in regulating injury compensation; and apart from the proviso, the elements of both Martin's state-law claims appear to be independent of bargaining agreement

> provisions. . . . Rather, Shaw's argues that Massachusetts has as a matter of state law chosen to make the substantive rights conferred by the statutes depend upon their not being "inconsistent" with a labor agreement. This court endorsed just such a reading of the proviso ... in Magerer v. John Sexton & Co., 912 F.2d 525, 529-30 (1st Cir. 1990). And Magerer merely holds Massachusetts to the literal wording of its own statute.

App. 7a.

The First Circuit's view of the pre-emptive consequence of such a proviso is in direct conflict with that of the Seventh Circuit, which has held an essentially identical proviso not to compel complete pre-emption of a state statutory workers' compensation claim. In Kohl's Food Stores v. State of Wisconsin and Hyland, the Seventh Circuit reviewed a decision by the Wisconsin Labor and Industry Review Commission ("Commission") that the defendant employer had violated Wisconsin's Worker's Compensation Act by refusing to rehire the plaintiff for his old job. Kohl's Food Stores v. State of Wisconsin and Hyland, 32 F.3d 1075, 1076 (7th Cir. 1994) (hereinafter, "Kohl's Food Stores"). The Wisconsin statute provided, in pertinent part:

> Any employer who without reasonable cause refuses to hire an employee . . . where suitable employment is available within the employee's physical and mental limitations . . . has exclusive liability to pay to the employee the wages lost during the period of such refusal . . . [I]n determining the availability of suitable employment the continuance in business of the employer shall be considered and any collective

> bargaining agreement with respect to seniority shall govern.

Kohl's Food Stores, 32 F.3d at 1077 (emphasis added). The plaintiff Hyland claimed, and the Wisconsin Labor and Industry Review Commission ("Commission") found, that Kohl's had violated the statute by refusing to rehire Hyland to his old job without justification. Id., 32 F.3d at 1076.

In analyzing Hyland's claim, and the employer's pre-emption defense, the Seventh Circuit began with the elements of the state claim as set forth by state courts. Kohl's Food Stores, 32 F.3d at 1077-1078. After an initial showing by the plaintiff, Wisconsin courts construed the state law to impose on the employer the burden to show "(1) that the employee could not do the work . . . applied for; and (2) that no other suitable work was available." Id., 32 F.3d at 1078 (emphasis in original) [internal citation omitted]. Although Kohl's contended Section 301 pre-emption applied because the question of whether "suitable employment is available" required an interpretation of the collective bargaining agreement then in force, the Seventh Circuit held the claim was not preempted merely because the collective bargaining agreement might be consulted in performing a statutory inquiry. Id., 32 F.3d at 1078-1079. Rather, the Seventh Circuit, heeding this Court's teaching in Lingle and the subsequent clarification provided in Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994)[6], emphasized the independence of the state created entitlement from rights granted under the agreement. Kohl's Food Stores, 32 F.3d at 1078-1079.

[6] This Court's decision in Norris issued exactly one week after that in Livadas. Hawaiian Airlines v. Norris, 512 U.S. 246, 266, 114 S.Ct. 2239, 2251 (1994).

The Seventh Circuit's reasoning in part devolves from the understanding that a statute's deference to contractual seniority (or other) provisions does not transform a state granted right into a right derived from or substantially dependent on interpretation of the collective bargaining agreement. See, Livadas, 512 U.S. at 124, 114 S.Ct. at 2078, citing, Lingle, 486 U.S. at 413, n.12, 108 S.Ct. at 1885, n.12 ("when the meaning of a contract term is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished"). The First Circuit's opinion holds otherwise. Despite its citations to this Court's decisions in Lingle and Livadas, the First Circuit's reasoning and result ignore the teachings of those cases and conflict directly with the Seventh Circuit's decision on a virtually identical issue. In short, to litigate her claims Martin does not raise any question of what Shaw's and the Union agreed to in their bargained agreement -- it is solely the defendant that contends the bargaining agreement is somehow to be implicated.

II. THE FIRST CIRCUIT'S DECISION INTERPRETS THE MASSACHUSETTS STATUTE TO PENALIZE INDIVIDUALS FOR THEIR EXERCISE OF COLLECTIVE BARGAINING RIGHTS BY WITHDRAWING FROM SUCH PERSONS THE LAW'S PROTECTIONS AND THUS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The First Circuit's approach to § 301 pre-emption in this case also stands in direct conflict with this Court's recent pronouncements on the subject. In the Livadas case, this Court emphasized repeatedly that "the bare fact that a collective-bargaining agreement will be consulted in

the course of state-law litigation plainly does not require the claims to be extinguished." Livadas, 512 U.S. at 124, 114 S.Ct. at 2078. See also, id., 512 U.S. at 123, n.17, 114 S. Ct. at 1078, n. 17. See also, e.g., id. at 2078, n.17 ("§ 301 does not disable state courts from interpreting the terms of collective-bargaining agreements in resolving nonpre-empted claims"); id., 512 U.S. at 124, n. 18, 134 S.Ct. at 2078, n. 18 (citing Collyer Insulated Wire, Gulf & Western Systems Co., 192 NLRB 837 (1971)[7]. It is the central holding of Livadas, however, that the First Circuit's statutory construction and application of § 301 pre-emption directly offend.

Since the "modest sprouting" of Section 301 pre-emption announced in Allis-Chalmers v. Lueck, see, Livadas, 512 U.S. at 122, 114 S.Ct. at 2077, this Court repeatedly has confined the reach of a doctrine that, overbroadly applied, intrudes on the traditional police powers of the states, undermines a fundamental proposition of federal removal jurisdiction, and unnecessarily clogs federal dockets with state law cases reflexively removed from state courts by unionized employer defendants in state law actions. See, e.g., Fort Halifax v. Coyne, 482 U.S. 1, 21, 107 S.Ct. 2211, 2222, 96 L.Ed.2d 1 (1987) ("preemption should not be lightly inferred" where subject matter "falls within the traditional police power"); Caterpillar v. Williams, 482 U.S. at 398m 107 S.Ct. at 2433 (presence of a § 301 question in defensive argument "does not overcome the paramount policies embodied in the well-pleaded complaint rule"). See also, San Diego Building Trades Council v. Grmon, 359 U.S. 236, 239, 79 S.Ct. 773, 776, 3 L.Ed.2d 775 (1989) (federal law preemption of state law claims gives

[7] Collyer stands for the proposition that deferral of a contractual issue in the first instance to an arbitrator need not oust the original forum of jurisdiction over the action as a whole.

"rise to difficult problems of federal-state relations"). Most recently in Livadas, this Court warned specifically against according too broad a sweep to Section 301 pre-emption when it struck down a California Labor Commissioner's policy denying enforcement of a state wage-payment statute to employees covered by bargaining agreements containing wage scales and provisions for grievance arbitration. Livadas, 512 U.S. at 114, 126, 130-131, 114 S.Ct. at 2073, 2080, 2082.

In Livadas this Court ruled the state Department of Labor's policy was itself preempted by federal labor law because it disenfranchised employees, based solely upon their participation in the collective bargaining process, from the benefits of a state entitlement otherwise available to all. Livadas, 512 U.S. at 116, 117, n.11, 114 S.Ct. at 2074, 2074, n.11. As analyzed by the Court, the Commissioner's policy in effect "presented [the plaintiff] and others like her with the choice of having state-law rights...enforced or exercising the right to enter into a collective bargaining agreement with an arbitration clause." Livadas, 512 U.S. at 117, 114 S.Ct. at 2075. The Court also cited its well-settled requirement that any union waiver of statutory rights must be "`clear and unmistakable'... for a court even to consider whether it could be given effect." Livadas, 512 U.S. at 125, 114 S.Ct. at 2079. Accordingly, the Court noted there was "no suggestion here that Livadas's union sought or purported to bargain away her protections under [the state statute]... nor...any indication that the parties [to the CBA]...understood their arbitration pledge to cover these state-law claims. [Citation omitted]." Id.[8] Finally, while

[8] The court also recognized that denying represented employees basic state granted employment protections implicitly would "forc[e] employees or employers to bargain for what they would otherwise be entitled to as a matter of course," a result to be avoided. Livadas, 512 U.S. at 130,

not outlawing state statutes that contain "opt-out" provisions for unionized employees from otherwise-provided state statutory rights, this Court made clear that such opt-outs will be recognized only where they are explicitly and narrowly drawn. Id.; see also, id. at 2081.

In contrast to this Court's high standard for recognizing when parties have opted out of a state's "basic employment guarantees," Livadas, 512 U.S. at 130-131, 114 S.Ct. at 2081-2082, the First Circuit here permitted undefined potential inconsistencies to trigger 301 pre-emption, extinguish Martin's claims, and leave her without any remedy. Such a sweeping application of preemption, however, unconstitutionally infringes on LMRA rights since virtually every employer with a collective bargaining agreement may assert that "several of the CBA provisions `could be construed to govern' the plaintiff's claims...." and thus meet the First Circuit's test for pre-empting state minimum employment standards. If allowed to stand, the First Circuit's decision here would virtually wipe out key protections provided by Massachusetts' workers' compensation law for any current or former member of a collective bargaining unit, and essentially immunize unionized employers from those provisions' reach. Neither Congress, in Section 301, nor the Massachusetts Legislature, in Chapter 152, §§ 75A, 75B, could possibly have intended such a result.[9]

III. THE FIRST CIRCUIT'S DECISION CONTINUES THE DISARRAY IN THE CIRCUITS OVER WHETHER SECTION 301 PRE-EMPTION

[9] See, also, 28 U.S.C. § 1445(c) ("A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States").

ARISES ONLY WHEN AN ELEMENT OF A PLAINTIFF'S CLAIM DEPENDS ON RESOLUTION OF A CONTRACTUAL ISSUE OR WHETHER AN ASSERTED DEFENSE MAY FORCE REMOVAL AND EXTINGUISHMENT OF A PLAINTIFF'S STATE LAW CLAIMS.

In this case, as in many others, Plaintiff Martin's state court complaint invoked no right derived from a collective bargaining agreement. Martin alleged only that Massachusetts' workers' compensation law entitled her to preferential consideration for re-employment and protected her from retaliation for having previously enjoyed that law's benefits. In its judgment of dismissal and opinion, however, the First Circuit accords completely pre-emptive power to the defendant's contention that a collective bargaining agreement, which does not even apply to Martin, may nonetheless provide a defense to all of Martin's claims. In so doing, the First Circuit continues the long-standing split in the circuits concerning the impact of collective bargaining agreement-based defenses on Section 301 pre-emption.

Like the First Circuit, the Eighth Circuit Court of Appeals adheres to the view that "defenses as well as claims must be considered in determining whether resolution of the state law claim requires construing the collective bargaining agreement." Hanks v. General Motors Corporation, 859 F.2d 67, 70 (8th Cir. 1988). Since this Court's decision in Livadas, the Eighth Circuit found a state handicap discrimination claim pre-empted where the employer asserted that contractual seniority provisions governed the availability of suitable work for the plaintiff. Davis v. Johnson Controls, Inc., 21 F.3d 866, 868 (8th Cir. 1994). As did the First Circuit in Martin, the Eighth Circuit in Davis pre-empted the state law plaintiff's claim based solely on the defendants'

assertions that contractual seniority provisions "would have to be reviewed" in order "to show that Johnson could have reasonably accommodated [the plaintiff's] request to return to work." Davis, 21 F.3d at 868. As in Martin, however, there is not a shred of evidence cited of any actual, rather than hypothetical, contractual obligation inconsistent with, or even necessary to the determination of the plaintiff's state law rights.

In sharp contrast, the Second, Fourth, Fifth, Sixth, and Seventh Circuit Courts of Appeals have, within the same time frame, issued opinions declining to pre-empt state claims on the basis of employers' asserted contractually-related defenses. In Gay v. Carlson, for example, the Second Circuit Court of Appeals relied heavily on this Court's ruling in Hawaiian Airlines v. Norris, when it held that "the possibility that reference may be made to a collective bargaining agreement in connection with a justification defense...does not give rise to pre-emption of state law tort claims under the Railway Labor Act. [citation to Norris omitted]." Gay v. Carlson, 60 F.3d at 87. The Second Circuit acknowledged its previously expansive view of pre-emption under the Railway Labor Act "has been called into question by the Supreme Court's decision in Norris." Gay v. Carlson, 60 F.3d at 83, 88. Heeding this Court's teachings on pre-emption in both Norris and Livadas, the Second Circuit properly recognized that despite the possible need to consult the collective bargaining agreement, "[s]tate law provides the only source of the rights asserted by [the plaintiff]...." Gay v. Carlson, 60 F.3d at 83, 88.

Similarly, the Seventh Circuit Court of Appeals declined to pre-empt state law contract claims based on an individual defendant's assertions that the terms of a collective bargaining agreement conflicted with the terms of his individual employment contract. Loewen Group International, Incorporated v. Haberichter, 65 F.3d,

1423-24 (7th Cir. 1995). The Seventh Circuit rejected the Defendant's invocation of Section 301 pre-emption for two reasons:

> First,... the Supreme Court has made clear that not all cases which tangentially touch collective bargaining agreements call for §301 pre-emption [citation omitted]... It is true that the Court has indicated that in some situations a plaintiff's claims cannot be resolved without substantively interpreting the terms of a collective bargaining agreement raised as a defense. [citations to Caterpillar, 482 U.S. 386, and Livadas, omitted]... But the Court de-emphasized the importance of such defenses under §301 and suggested that pre-emption may not be the only means of vindicating the arbitrator's primacy in these situations. Livadas, 114 S.Ct. at 2078, n.18.
>
> Second, and more to the point here, merely examining the collective bargaining agreement to determine whether a conflict actually exists is not "interpreting the collective bargaining agreement for §301 pre-emption purposes. [citation omitted]"

Loewen Group International, 65 F.3d at 1417, 1423. Both principles underlying the Seventh Circuit's rationale in Loewen Group International conflict directly with the First Circuit's reasoning and result in this case.

Joining the Second and Seventh Circuits, the Fourth and Fifth Circuits have expressly reconsidered their respective analyses of federal labor pre-emption based on asserted defenses. In Martin Marietta Corporation, Aero & Naval Systems v. Maryland Commission on Human Relations, 38 F.3d 1392, 1401-02 (4th Cir. 1994), the Fourth Circuit

held that neither a retaliatory discharge claim nor a failure to rehire claim based on disability discrimination were pre-empted by an applicable collective bargaining agreement. Even though the collective bargaining agreement there contained provisions relating to work-injured employees' absences, conditions for returning to work, and qualification to perform work, the Fourth Circuit found no preemption because "if the final resolution of the state law dispute tangentially involves some interpretation of a provision of the agreement, this fact alone would not require automatically that Price's claim be preempted by Section 301." Martin Marietta, 38 F.3d at 1401. With respect to the the defendant's collective bargaining agreement-based defense to plaintiff's retaliatory discharge claim, the Fourth Circuit stated:

> ...[I]t may be that Martin Marietta followed the terms of the Collective Bargaining Agreement in terminating Price once he was no longer eligible for workers' compensation benefits, but at the same time it may have used the CBA terms as a pretext to engage in retaliatory discharge.

Id. at 1403. Accordingly, the Court found no pre-emption.

In Hirras v. National Railroad Passenger Corporation, d/b/a Amtrak, 44 F.3d 278 (5th Cir. 1995), the Fifth Circuit, on remand from this Court, withdrew its prior opinion in the same case in which it had affirmed the district court's dismissal of the plaintiff's state law claims as pre-empted, and substituted an opinion reversing such pre-emption and dismissal. Hirras, 44 F.3d at 280. Unlike the First and the Eighth Circuit Courts of Appeals, the Fifth Circuit understood this Court in Norris and Livadas to exclude from the reach of Section

301 pre-emption contractual issues raised as defenses. Hirras, 44 F.3d at 282-284, 283, n.10.

To add to the already frank confusion, the Ninth Circuit Court of Appeals has signaled it may be altering its application of its standard for determining "independent" state law rights, in response to the Livadas decision, even as it putatively adheres to the view that "potential defenses are also relevant to the pre-emption analysis." Jimeno v. Mobil Oil Corporation, 66 F.3d 1514, 1523-1524 (9th Cir. 1995) (no pre-emption of state law claim where claim can be evaluated without reference to collective bargaining agreement, even if agreement arguably addresses related subjects). Compare, Utility Workers v. Southern California Edison, 852 F.2d 1083, 1086-1087 (9th Cir. 1988); Laws v. Calmat, 852 F.2d 430, 433 (9th Cir. 1988) (Both cases holding employee's state law privacy claim pre-empted when defendant employer asserts waiver of privacy right by management rights clause or other provision of collective bargaining agreement).

The above cases, issued since this Court's decisions in Livadas and Norris, reflect the persistent confusion and conflict over the ability of a defendant to remove and extinguish a state law plaintiff's claims simply by asserting a contractual defense. See, also, e.g. Smolarek v. Chrysler Corporation, 879 F.2d 1326, 1334 (6th Cir.) (en banc) cert. denied, 493 U.S. 992, 110 S.Ct. 539 (1989) (that defendant may "assert that its treatment of [plaintiff] was allowed or required by the terms of the collective bargaining agreement...does not support removal to federal court"); Local No. 57 v. Bechtel Power Corp, 834 F.2d 884, 889 (10th Cir. 1987) (even if state court "would find the collective bargaining agreement relevant to show waiver or consent as a state law defense to plaintiffs' allegations," no complete Section 301 pre-emption of state law claim). The persistence of such disarray on an issue

implicating the important matters of federalism, state police power, and federal court jurisdiction clearly warrants this Court's intervention and guidance.

This split over the reach of Section 301 pre-emption endures despite the fact that this Court has addressed the issue directly. In Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-399, 107 S.Ct. 2425, 2432-2433, 96 L.Ed. 2d 318 (1987), this Court squarely held that a defense based on interpretation of a § 301 contract does not trigger complete § 301 pre-emption for purposes of removal of state law claims from state court. Caterpillar, Id. This Court held:

> It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule. . . . When a plaintiff invokes a right created by a collective bargaining agreement, the plaintiff has chosen to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law . . . .[citations and note omitted].

Id. (emphasis added).

Although one passage in this Court's Lingle opinion arguably could be read to endorse consideration of defenses in determining whether contract interpretation or application is "required" to decide a state law claim, in

Livadas this Court emphatically endorsed the vitality of Caterpillar's holding. See, Lingle, 486 U.S. at 407, 108 S.Ct. at 1882. (surveying elements of state law defense before concluding that resolution of state law claim does not require construing the collective bargaining agreement); Livadas, 512 U.S. at 124, n.18, 114 S.Ct. at 2078, n.18. Thus in Livadas this court cited expressly to the holding of Caterpillar in a discussion of the very circumstances prompting invocation of preemption here, "that a plaintiff's claim cannot be `resolved' absent collective-bargaining agreement interpretation, i.e. that a term of the agreement may or does confer a defense...." Livadas, 512 U.S. at 124, n. 18, 114 S.Ct. at 2078, n.18. After citing to Caterpillar's reversal of preemption and removal on that basis, this Court, as noted earlier, supra, opined that "[h]olding the plaintiff's cause of action sustantively extinguished may not always be only means of vindicating the arbitrator's primacy as bargained for contract-interpreter." Id.

Caterpillar's rule foreclosing complete pre-emption based on a defendant's raising a contractual defense is consistent not only with principles of federal removal jurisdiction, Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983), Gully v. First National Bank, 299 U.S. 109, 112-113 (1936), but also with the purposes underlying Section 301 pre-emption. Section 301, by its terms and by this Court's construction, provides federal jurisdiction and federal substantive law where a plaintiff seeks to adjudicate contract-based rights, either in form or in substance. 29 U.S.C. § 185(a); Livadas, 512 U.S. at 123-124, 114 S.Ct. at 2078. Unless Section 301 pre-emption is similarly limited to those cases where a plaintiff seeks to adjudicate a contract-based right, defendants may virtually extinguish state law causes of action and leave plaintiffs remedyless, simply by invoking

a collective bargaining agreement-related defense, whether the asserted defense be arguably meritorious or entirely frivolous.

The fact that Martin here is left without a remedy thus should weigh heavily rather than cursorily in the First Circuit's analysis. App 10a ("Pre-emption sometimes does result in a complete denial of remedies for obvious wrong, e.g. Smith v. Dunham Bush, Inc., 959 F.2d 6, 11 (2nd Cir. 1992)"). The First Circuit's citation to Smith v. Dunham Bush, Inc. is not on point, as Smith concerns pre-emption of state law claims by Section 514(a) of ERISA.[10] Smith, 959 F.2d at 11. Unlike ERISA's statutory pre-emption as enacted by Congress, however, Section 301 pre-emption arose as a judicial creation, inferred from the LMRA's grant of federal jurisdiction for suits claiming violation of a collective bargaining agreement. See, Livadas, 512 at 121-125, U.S. 114 S.Ct. at 2077-2079; Allis-Chalmers v. Lueck, 471 U.S. 202, 208-212, 1055 S.Ct. 1904, 1909-1911 (1985). While Congress intended in ERISA to foreclose any remedy not expressly provided in the federal statute, the policy underlying Section 301 pre-emption in fact derives substantially part from the availability of an alternative (contractual) remedy to the state law claims pre-empted. Id. There was never any Congressional purpose or intent expressed in Section 301 to foreclose state law remedies absent the parties' agreement to arbitrate a particular dispute as it concerned a particular member of the bargaining unit covered by the collective bargaining agreement. The First Circuit's willingness here to leave Martin without an alternative remedy under the collective bargaining agreement violates the very purposes animating Section 301 pre-emption. See, also, e.g.,

[10] Section 514(a) provides that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 26, 103 S.Ct. 2841, 2855, 77 L.Ed.2d 420 (1983) ("ERISA does not provide an alternative cause of action in favor of the State to enforce its rights, while § 301 expressly supplie[s] the plaintiff. . . with a federal cause of action to replace its pre-empted state contract claim").

IV. THE FIRST CIRCUIT'S APPLICATION OF SECTION 301 PRE-EMPTION TO EXTINGUISH THE STATE LAW CLAIMS OF A PERSON NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT IS UNPRECEDENTED.

Finally, there is simply no precedent for the extraordinary holding of the First Circuit that Section 301 pre-emption applies in a state law cause of action brought by an individual not covered by a collective bargaining agreement at the time her state law claims arose. On the contrary, in every case known to the Petitioner, where the question of § 301 pre-emption even colorably arises, the threshhold question of the plaintiff's coverage by a collective bargaining agreement has been asked and answered in the affirmative. See, e.g., Allis-Chalmers v. Lueck, 471 U.S. 202, 202-204, 218 (1985) (plaintiff a member of bargaining unit covered by collective bargaining agreement at time of dispute over health insurance benefits granted by contract); Lingle, 486 U.S. at 401, 108 S.Ct. at 1879. ("The question presented in this case is whether an employee covered by a collective-bargaining agreement that provides her with a contractual remedy for discharge without just cause may enforce her state law remedy for retaliatory discharge"); Livadas v. Bradshaw, 512 U.S. at 110, 114 S.Ct. at 2071 (1994) (terms and conditions of employment of discharged

wage claimant covered by collective bargaining agreement); Quesnel v. Prudential Insurance Company, 66 F.3d 8, 11 (1st Cir. 1995) (where resolution of plaintiff's wrongful termination claims depend on contractually established compensation rates, inter alia, "his claims are preempted if [plaintiff] is indeed subject to the CBA's terms"); Magerer v. John Sexton & Co., 912 F.2d 525, 528, 529 (1st Cir. 1990) ("the record conclusively demonstrates that plaintiff's employment became subject to a collective bargaining agreement," [which] "agreement provides standards to govern the conduct underlying plaintiff's retaliatory discharge claim"); Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988) ("[plaintiff] was a part of the bargaining unit" covered by a CBA and "was obligated to grieve -- not sue. . . .").

To suggest that the Collective Bargaining Agreement can create a conflict between the rights Ms. Martin asserts and the Agreement when Ms. Martin was neither subject to nor covered by the Agreement foreshadows the absurd result of applying Section 301 preemption to virtually any individual who applies for work with Shaw's or any other unionized employer in Massachusetts. Since virtually every labor contract contains a management rights article, seniority provision, and/or recall from layoff clause, the First Circuit's decision effectively states that Mass. Gen. L. ch. 152, §§ 75A and B, important state law protections for injured workers, may be rendered meaningless even where the formerly injured worker is neither subject to nor covered by a collective bargaining agreement and thus has no alternative remedy.

CONCLUSION

For the reasons set forth above, the Court should grant this Petition for a Writ of Certiorari and summarily reverse the judgment of the First Circuit Court of Appeals, or, in the alternative, grant certiorari and grant plenary review.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1863

THERESA MARTIN,
Plaintiff, Appellant,

v.

SHAW'S SUPERMARKETS, INC.,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Morris E. Lasker,* Senior U.S. District Judge]

Before
Selya, Circuit Judge,
Aldrich, Senior Circuit Judge,
and Boudin, Circuit Judge.

Scott W. Lang with whom Susan Forgue Weiner and Lang, Xifaras & Bullard, P.A., Lisa M. Sheehan, Kate Mitchell & Associates, Betsy L. Ehrenberg and Angoff, Goldman, Manning, Pyle & Wanger, P.C. were on briefs for appellant.

Betsy L. Ehrenberg with whom Harold L. Lichten and Angoff, Goldman, Manning, Pyle & Wanger, P.C. were on brief for United Food and Commercial Workers Local Union 791 and National Employment Lawyers Association, Massachusetts Chapter, Amici Curiae.

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* Of the Southern District of New York, sitting by designation.

Duane R. Batista with whom Sharon R. Burger and Nutter, McClennen & Fish, LLP were on brief for appellee.

January 28, 1997

BOUDIN, Circuit Judge. This case, presenting a difficult preemption issue, began in January 1996 when Theresa Martin sued Shaw's Supermarkets, Inc., in Massachusetts state court for alleged violations of state employment-compensation laws. Martin, an employee of Shaw's since 1979, had injured her back in August 1994 while working as a bakery clerk. In September 1994, she began receiving workers' compensation benefits for temporary total disability. Mass. Gen. Laws ch. 152, § 34.

In March 1995, Shaw's requested that Martin's physician, Dr. James Coleman, establish any necessary work restrictions for Martin. Coleman gave Shaw's a list of physical restrictions and indicated that Martin could return to work if these restrictions were respected. Shaw's then asked Martin to see a second doctor. Based on the second examination, Shaw's offered Martin four weeks of modified duty, to be followed by return to her former position without restrictions.

Martin did not return to work. Instead, through her attorney, she again asked for a position fitting the restrictions set by Coleman. Shaw's responded by again offering Martin her former position with no restrictions. When discussion failed to resolve the matter, Shaw's sent Martin a letter in September 1995 informing her that she was terminated. The letter referred to Shaw's "policy

and contract language concerning extended periods of absence."

On October 19, 1995, Martin reapplied for full-time employment with Shaw's, requesting a position with duties modified as Coleman had recommended. Shaw's did not respond. Later in the month, Martin's union filed a grievance on her behalf under its collective bargaining agreement with Shaw's, alleging that Martin had been unjustly terminated and requesting her reinstatement with reasonable accommodations.

Three months later, Martin filed the present action in Massachusetts state court, claiming that Shaw's had violated Mass. Gen. Laws ch. 152, §§ 75A, 75B(2), by failing to rehire her. These sections provide, respectively, that an employee who lost her job as a result of compensable injury must be given rehiring preference by the former employer over non-employee applicants, id. § 75A, and that no employer may refuse to hire an employee because she asserted a workers' compensation claim, id. § 75B(2). Martin's suit did not contest Shaw's right to discharge her in the first instance.

In March 1996, Shaw's removed the action to federal court, premising jurisdiction under 28 U.S.C. § 1331, and moved to dismiss, Fed. R. Civ. P. 12(b)(6). The district court granted Shaw's motion, agreeing that Martin's claims were preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Martin now appeals this ruling. The sole issue on appeal is whether section 301 preempts Martin's state-law claims.[1]

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[1] The asserted jurisdictional basis for removal--preemption--might appear to offend the well-pleaded complaint rule, but where section 301 preemption is concerned, the Supreme Court has held that removal is proper. Caterpillar Inc. v. Williams, 482 U.S. 386, 393-94 (1987).

Section 301 modestly provides only that "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 U.S.C. § 185. But jurisdiction begat substantive authority. In Textile Workers v. Lincoln Mills, 353 U.S. 448, 451 (1957), the Supreme Court ruled that this section "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements."

In turn, substantive authority gave rise to preemption. In Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962), the Supreme Court held that state law is displaced when courts are "called upon to enforce" collective bargaining agreements, because those agreements should be governed by federal doctrine, rather than varying state contract-law principles. Then, two decades later, the Supreme Court said that "the pre-emptive effect of § 301 must extend beyond [state-law] suits alleging contract violations." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210 (1985).

Just how far beyond has never been precisely settled. Allis-Chalmers preempted a state-law tort claim closely relating to the handling of a labor-agreement grievance. Shortly thereafter the Court declared that state-law claims--seemingly of whatever character--are preempted if they "require construing the collective-bargaining agreement." Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988). Yet recently, the Supreme Court cautioned that section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." Livadas v. Bradshaw, 114 S. Ct. 2068, 2078 (1994).

Nevertheless, Livadas repeated the basic test laid down by Lingle--namely, that section 301 preempts a state-law

claim wherever a court, in passing upon the asserted state-law claim, would be required to interpret a plausibly disputed provision of the collective bargaining agreement. Id. At first blush, this might seem a puzzling test: both state and federal courts have authority to enforce collective bargaining agreements, and so to interpret their provisions. See Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506 (1962).

The explanation lies in the Supreme Court's concern to enforce arbitration clauses, almost always a feature of labor contracts. If judges construed labor agreements in the first instance, the Court believed that the arbitration process would be undermined, and there might be divergent readings of the labor agreement and interference with the grievance process itself. Livadas, 114 S. Ct. at 2078; Allis-Chalmers, 471 U.S. at 219. Such an arbitration clause is present in this case.

We thus begin by asking, as we have done in the past, e.g., Quesnel v. Prudential Ins. Co., 66 F.3d 8, 10-11 (1st Cir. 1995), whether resolution of Martin's claims would require an interpretation of the collective bargaining agreement. Our premise is that this means a real interpretive dispute and not merely a pretended dispute. Indeed, the Supreme Court has said that the need merely to refer in passing to the agreement will not necessarily preempt. Livadas, 114 S. Ct. at 2078.

Martin has alleged violations of Mass. Gen. Laws ch. 152, §§ 75A, 75B(2). Section 75A creates a priority for rehiring:

> Any person who has lost a job as a result of an injury compensable under this chapter shall be given preference in hiring by the employer for whom he worked at the time of compensable injury over any persons not at the

> time of application for reemployment employed by such employer; provided, however, that a suitable job is available.

The relevant portion of section 75B(2)--a conventional prohibition against retaliation--states that "[n]o employer . . . shall . . . refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by this [workers compensation] chapter."

If the statutes stopped here, this might be a different case. But both statutory sections also contain a proviso that "[i]n the event any right set forth in this section is inconsistent with an applicable collective bargaining agreement," the agreement shall prevail. Id. §§ 75A, 75B(3). Shaw's argues that both of Martin's statutory claims are inconsistent with the labor agreement; that resolution of this "inconsistency" charge requires interpretation of the agreement; and that the claims are therefore preempted under the Supreme Court's own rubric.

It is very doubtful whether, without this last-quoted proviso, Shaw's would have any plausible claim of federal preemption. Massachusetts has an independent interest in regulating injury compensation; and apart from the proviso, the elements of both Martin's state-law claims appear to be independent of bargaining agreement provisions. There are other types of labor preemption, apart from Lingle's "require construing" test,[2] but

[2] Broadly speaking, most cases of preemption in the labor field involve conflict, or potential conflict, between state law and federal labor policy. But sometimes the conflict arises out of some source other than the need to interpret a labor agreement. E.g.,

Shaw's does not argue that Martin's state claims would be preempted absent the proviso.

Rather, Shaw's argues that Massachusetts has as a matter of state law chosen to make the substantive rights conferred by the statutes depend upon their not being "inconsistent" with a labor agreement. This court endorsed just such a reading of the proviso of section 75B, which is identical in substance to the provision of section 75A, in Magerer v. John Sexton & Co., 912 F.2d 525, 529-30 (1st Cir. 1990). And Magerer merely holds Massachusetts to the literal wording of its own statute.

The question remains whether Shaw's labor agreement is colorably inconsistent with Martin's state-law claims. Shaw's best argument rests upon the agreement's "management rights" clause, which states that Shaw's has the "sole right to manage its business including . . . the right[] . . . to hire, assign and promote Employees." Shaw's says that Martin is a former employee seeking to be rehired, that the agreement regulates this subject (but not in a way that protects Martin in this case), and that in all other respects the union has agreed to management's right to choose which former employees to rehire.

Martin responds that the "management rights" clause cannot be inconsistent with her state-law claims in this case because she is no longer covered by the agreement. Yet the agreement does give former Shaw's employees some specific priority rights to be rehired. See Collective Bargaining Agreement Art. 12(B) ("Full-time employees laid off because of lack of work when no other full-time work is available shall be offered part-time work [if available] . . . ."). And the "management rights" clause by its terms embraces decisions as to hiring.

Martin next says that Shaw's employee handbook

Livadas; San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

guarantees to her the very right to priority in rehiring established by section 75A. The handbook does contain language that is fairly close to the rehiring priority contained in section 75A, suggesting that Shaw's itself treats this priority right (although not necessarily the protection against retaliation) as consistent with its "management rights" clause. But for purposes of construing the "management rights" clause, the handbook is at best a gloss.

Whether the handbook does constitute a gloss and, if so, what weight it should be given are issues of interpreting the collective bargaining agreement. The handbook may well weaken Shaw's reliance on the "management rights" clause; but the handbook may simply be a reference to state law, whose application Shaw's has now rethought in the face of litigation. To entertain Martin's state-law claims would still require a court to interpret the agreement, which is precisely what Supreme Court precedents forbid. Accord Magerer, 912 F.2d at 530.

Martin next asserts that any waiver of statutory rights by a union and management in a collective bargaining agreement must be "clear and unmistakable." See Livadas, 114 S. Ct. at 2079 (citations omitted). But Shaw's preemption claim does not depend upon a "waiver" of statutory protections; indeed, it is unclear under Massachusetts law that the statutory protections can be "waived." Cf. Mass. Gen. Laws ch. 152, § 75B(3) (limiting waiver). Rather, the statutes themselves expressly withhold protection where it would be "inconsistent" with labor agreements, without requiring the inconsistency to be "clear and unmistakable."

We conclude that under Supreme Court and First Circuit precedent, Martin's state law claims are preempted. This is not because the collective bargaining

agreement is inconsistent with the state claims asserted, but because it may be so and requires interpretation. We could ourselves remove the doubt by interpreting the agreement one way or the other, but this course has been foreclosed in deference to the arbitration clause. As all of this appears to follow logically, the question remains why the outcome may seem faintly troubling.

One reason is that Massachusetts' statutory proviso, making the rights conferred yield to inconsistent labor agreements, may be producing some results that the legislature did not intend. When the statutes were enacted in December 1985, Massachusetts might have thought that the proviso was necessary to avoid preemption; the legislature might be chagrined to discover that the proviso has unnecessarily curtailed workers' rights. But this is at best a debatable inference,[3] preempted). and we have found no helpful legislative history.

Possibly, the proviso could be construed to require more than mere inconsistency. Or a state court could hold that the rights conferred yield only to highly specific provisions in a labor agreement and not to a generic "management rights" clause. But both readings would ignore the explicit language of the proviso. Perhaps the state did intend to defer to the labor agreement even where it assisted the employer. Despite the clear warning sent by Magerer in 1990, Massachusetts has not chosen to

[3] Shortly before the legislature acted in 1985, the Supreme Court made clear that section 301 does not "give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation." Allis-Chalmers, 471 U.S. at 212. See also Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755-56 (1985) (holding that state mandated-benefits laws were not generally preempted).

amend the statutes.

The other reason why the outcome may seem troubling is that it could result in Martin having no claim at all against Shaw's, even for retaliation. This charge is, of course, merely an allegation; but even if it proved to have substance, it would be preempted because of the collective bargaining agreement, and yet the agreement may itself provide no remedy. Preemption sometimes does result in a complete denial of remedies for obvious wrong, e.g., Smith v. Dunham-Busch, Inc., 959 F.2d 6, 11 (2d Cir. 1992), but this is not a result one eagerly embraces.

Various possibilities may cushion this outcome. If the employee handbook is a gloss on the collective bargaining agreement, perhaps the language already mentioned may not only defeat the "management rights" defense but also give rise to affirmative obligations on the part of the employer enforceable through arbitration. Or, perhaps arbitration would yield a definitive ruling that the "management rights" clause, and any other clause relied upon by Shaw's, is not "inconsistent" with the rights contingently secured by the statutes.

If all else fails, the union is free to negotiate language that eliminates this issue the next time it renews its labor agreement. The parties entered the current agreement in 1994, well after Magerer was decided, but the absence of such language in the present agreement may be an oversight. All that it would take to prevent preemption is an explicit provision stating that nothing in the agreement is intended to create management rights inconsistent with any workers' rights under sections 75A and 75B.

Finally, in a reply brief, Martin and her union (which appears as an amicus and has ably supported Martin) offer a preemption claim of their own. They say that a discharged non-union worker could invoke the Massachusetts statutes and that by allowing the collective

bargaining agreement to extinguish Martin's rights, the Massachusetts proviso discriminates against members or former members of unions, thereby offending federal labor policy. This, they say, Livadas itself forbids.

Livadas struck down a state administrative practice because it effectively discriminated against union members as compared with non-members, 114 S. Ct. at 2074-75, a preemption theory that has nothing to do with section 301. On the reasoning of Livadas, Massachusetts arguably could not provide that a rehiring priority, or a claim against retaliation, would be made available only to workers who were not members of a union. But here Massachusetts has done nothing of the kind.

Instead, the proviso in question permits the union on behalf of its members to craft its own regime (the agreement) and in it, either to preserve or displace another regime (specified provisions of state law). Viewed in the large, there is no discrimination whatever against union members; Massachusetts simply allows the union to negotiate for a different package of benefits. Next time, as we have noted, the union is free to bargain differently.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 96-10431-MEL

THERESA MARTIN,
Plaintiff,

v.

SHAW'S SUPERMARKET, INC.,
Defendant.

APPEARANCES:

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VICTORIA L. BOTVIN, ESQ.

LASKER D.J.

Theresa Martin sues Shaw's Supermarket for wrongfully refusing to rehire her to a suitable position in violation of Sections 75A and 75B(2) of M.G.L. Chapter

152. Shaw's removed the case to this court pursuant to 28 U.S.C. § 1331 and now moves to dismiss both counts of Martin's complaint for failure to state a claim upon which relief may be granted, or in the alternative, for summary judgment.

I.

Shaw's argues that Martin's claims are preempted by the Labor Management Relations Act (LMRA) 29 U.S.C. § 185. Shaw's contends that the resolution of Martin's claims requires interpretation of a collective bargaining agreement (CBA) because

1) the rights afforded in §§ 75A and 75B are inconsistent with the CBA's provisions, which afford no right to be rehired, and 2) various provisions of the CBA "could be construed to govern" her claims. Magerer v. Sexton, 912 F.2d 525, 530 (1st Cir. 1990); see also Quesnel v. Prudential Ins. Co., 66 F.3d 8, 10 (1st Cir. 1995) ("Section 301 completely preempts a state law claim if the resolution of the claim necessitates analysis of, or substantially depends on the meaning of, a collective bargaining agreement.")

Martin moves to remand the case, arguing that her action does not depend upon the interpretation of a CBA because the CBA is silent as to the rehiring of an injured worker. Martin attempts to distinguish her claim from that of an employee seeking relief for a termination itself by stressing that she does not contest her termination, but rather, Shaw's failure to rehire her, and that this distinction means her dispute is not covered by the CBA.

II.

Are Martin's claims subject to the CBA?

Whether Martin is currently a union member is not relevant to the question of whether her claims are subject to the CBA. In Quesnel v. Prudential Ins. Co., 66 F.3d 8 (1st Cir. 1995), the First Circuit held that the plaintiff, a District Agent, was subject to the CBA's terms because he was "a member of the bargaining unit for whose benefit the CBA was created," even if he was not a union member. Id. at 11. In the present case, there is no dispute that Martin was a member of the United Food and Commercial Workers Union, Local 791, AFL-CIO, when she was dismissed. Accordingly, Martin's claims are subject to the CBA's terms.

Do Martin's claims require interpretation of the CBA?

In Magerer v. John Sexton & Co., 912 F.2d 525 (1st Cir. 1990), the plaintiff alleged that his dismissal was in retaliation for exercising his rights under the Massachusetts Workers' Compensation Act, in violation of M.G.L. Chapter 152, § 75B. The First Circuit held that the plaintiff's claim for retaliatory discharge was, by the express terms of the statute, subject to the terms of any applicable collective bargaining agreement. Because the CBA at issue in Magerer contained several provisions that "could be construed to govern the conduct underlying plaintiff's retaliatory discharge claim," the resolution of that claim "depend[ed] on an interpretation of the collective bargaining agreement, so that the claim [was] completely preempted by Section 301e" Id. at 530.

Martin is correct that the provisions of the CBA in the present case do not clearly delineate whether an injured employee who has been dismissed has a right to be rehired. However, Shaw's contention, that several of the CBA provisions "could be construed to govern" the plaintiff's claims, is more persuasive. Consistent with the findings in Magerer, Martin's claims are preempted by Section 301. Accordingly, it is for an arbiter to determine either 1) whether the CBA affords a right to be rehired or 2) whether the existing provisions of the CBA in fact apply to Martin's claims.

At oral argument, the parties indicated that the Union had previously brought a grievance on behalf of Martin, but that it later withdrew from the proceedings. Because there is no evidence of record as to the final result of those proceedings, Martin's claims are dismissed for such further proceedings as required by the CBA.

Martin's motion to remand is denied, and Shaw's motion to dismiss is granted.

It is so ordered

Dated: Boston, Massachusetts June 20, 1996

U.S.D.J.

UNITED STATES COURT OF APPEALS

No. 96-1863

THERESA MARTIN,
Plaintiff, Appellant,

v.

SHAW'S SUPERMARKET, INC.,
Defendant, Appellee.

BEFORE

Torruella, Chief Judge,
Aldrich, Senior Circuit Judge.
Selya, Boudin, Stahl and Lynch, Circuit Judges

ORDER OF COURT

Entered: February 28, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considerated by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

COLLECTIVE BARGAINING AGREEMENT
AGREEMENT
BETWEEN

UNITED FOOD AND
COMMERCIAL WORKERS UNION
LOCAL 791, AFL-CIO
AND

SHAW'S SUPERMARKETS, INC.,
SOUTHERN REGION

AND EAST BRIDGEWATER DISTRIBUTION
CENTER

EFFECTIVE DATES

JULY 31, 1994 - JULY 27, 1997

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This Agreement is made and entered in to this 31st day of July 1994 between Shaw's Supermarkets, inc. (for the Southern Region and East Bridgewater Distribution Center), a Massachusetts corporation with its principal place of business located at East Bridgewater, Massachusetts hereinafter referred to as the "Employer", and United Food and Commercial Workers Local 791, AFL-CIO, a voluntary unincorporated association hereinafter referred to as the "Union".

ARTICLE 1
RECOGNITION

Subject to any applicable provisions of State or Federal Law or regulation now or hereafter in effect, the Employer recognizes the Union as the exclusive bargaining agent with respect to wages, hours, and other conditions of employment of all Employees at the Employer's stores and warehouses presently, or hereafter, located in the following counties within the Commonwealth of Massachusetts: Norfolk, Plymouth, Bristol and Barnstable and the State of Rhode Island, including Part-time Employees, but excluding executives, buyers, store managers, assistant store managers, one associate assistant manager per store and one personnel coordinator per store, office clerical employees, guards, professional employees and supervisors as defined by the National Labor Relations Act, and as hereinafter used in this agreement the words "Employee" and "Employees" will be deemed to refer and only to an employee or employees, respectively, of the Employer in the bargaining unit described above.

The Employer may employ two additional non-unit

managers in new prototype stores. In high volume conventional stores the Employer may employ one additional non-unit manager provided that there is a full-time grocery manager assigned. In any conventional store with a food service operation, the Employer may employ two additional managers if there is a full-time grocery manager and one additional manager if no full-time grocery manager is assigned.

ARTICLE 2
UNION SECURITY

A. All Employees who are members of the Union as of the signing of this Agreement shall remain members of the Union as a condition of continued employment with the Employer.

B. All present Employees who are not now members of the Union shall make application for membership not later than the thirtieth (30th) day following the signing of this Agreement; and, if accepted, must remain members of the Union as a condition of continued employment with the Employer.

C. All Employees hired or transferred into the bargaining unit subsequent to the signing of this Agreement shall, not later than the thirtieth (30th) day after such hiring or transfer, make application for membership, and if accepted, must remain members of the Union as a condition of continued employment with the Employer.

D. The provisions of paragraph A., B., and C., of the Article shall not apply to any Employee covered by this Agreement whose membership in the Union is denied or whose membership therein has been terminated for reasons other than the failure of such Employee to tender his/her initiation fee of periodic dues.

E. It is understood that the Employer shall not be

required to discharge any Employee under this Article for reasons other than the failure to pay periodic dues or initiation fees uniformly required as a condition of acquiring or maintaining membership in the Union.

F. The Employer agrees to notify all new Employees under the bargaining-unit about their obligations under this Article. New Employees shall be considered probationary for the first thirty (30) days of employment which probationary period may be extended an additional thirty (30) days by mutual agreement of the Employer and the Union. The store Manager must notify the Union office in writing, prior to the extension.

G. In the event of a new store opening, there shall be a sixty (60) calendar day probationary period for newly hired Employees for that store, which probationary period may be extended an additional thirty (30) days by mutual agreement of the Employer and the Union. *The Store Manager must notify the Union of office in writing, prior to the extension.*

ARTICLE 3

CHECKOFF

A. The Employer, or each of its Employees who, individually and in writing, duly authorize the Employer to do so, will deduct from the earnings payable to each Employee, initiation fees and weekly union dues for such Employee's membership in the Union and shall promptly remit to the Union all such deductions accompanied by a list of Employees from whom membership dues have been collected and this amount so deducted. Said deductions shall be made from the wages paid on each weekly payday and shall be remitted to the President of the Union not later than the Friday of each week.

B. The form of authorization shall be that set forth below and shall be revocable at the time and in the

manner as therein described. "You are hereby authorized and directed to deduct from my wages, the Initiation fee and the weekly dues as established by members of the United Food and Commercial Workers Union, Local 7918 AFL-CIO and certified to you by the President of that Union." "The sum(s) so deducted by you shall be remitted to the President of the Union.

This authorization shall remain in effect until:

(a) Revoked by me and shall be irrevocable for a period of one (1) year from the date appearing hereon; or until the expiration of the present Agreement between the Employer and the Union (whichever is sooner) at which time it may be revoked by written notice by me to the employer by registered mail at any time during the period of ten (10) days prior to the expiration of the one 1 year period or ten (10) days prior to the expiration of the present Agreement (whichever is sooner);"

(b) When transferred permanently out of the bargaining unit. If no such notice is given, this authorization shall be irrevocable for successive periods of one (1) year thereafter, or until the termination of the then current Agreement, whichever occurs sooner, with the same conditions and privileges or revocation at the end of each such period.

Signature

Date

C. The employer agrees to deduct periodically from the pay of each employee who is a Union member and who executes an appropriate voluntary check-off authorization form to the UFCW Active Ballot Club the amount specified in the checkoff authorization form signed and dated by the employee. The deduction shall continue for the life of this agreement for each employee who signs a check-off authorization from unless the employees revokes the authorization in writing. The

employer agrees to transmit periodically UFCW Active Ballot Club deductions to the UFCW Active Ballot Club in Care of the local "Union" or the UFCW, as may be appropriate together with the names of employees for whom deductions have been made and the amount deducted for each employee.

All deductions and transmittals shall be subject to and in strict accordance with all applicable laws.

D. The employer agrees to deduct periodically from the pay of each employee who is a Union member and who executes an appropriate voluntary check-off authorization form to the UFCW Local 791 special Defense Fund the amount specified in the checkoff authorization form signed and dated by the employee. The deduction shall continue for the life of this agreement for each employee who signs a checkoff authorization form unless the employee revokes the authorization in writing the employer agrees to transfer periodically UFCW Local 791 Special Defense Fund deductions to the UFCW Local 791 Special Defense Fund in care of the local union or the UFCW, as may be appropriate, together with the names of employees for whom deductions have been made and the amounts deducted for each employee.

All deductions and transmittals shall be subject to and in strict accordance with all applicable laws.

ARTICLE 4
HOURS
Section 1.

Hours of employment as heretofore observed by the Employer, shall, except as otherwise provided, continue in effect during the term of this contract. The Employer agrees that no employee shall receive a reduction in wages or increase in hours worked without

being paid therefore as a result of this contract.

Section. 2.

Full-Time Employees.

The regular work schedule for full-time employees shall be forty (40) hours, five (5) days, a week provided in Article 6, Section.

Section 3.

A. Part-Time Employees. For purposes of the Agreement, a part-time employee is defined as one who is not normally scheduled to work less than 35 hours weekly. If a part time Employee works more than 36 hours in a week, he/she shall be paid a premium of 30% for all hours worked in excess of 36 hours.

B. Part-Timers shall work no less than fifteen (15) hours a week, Monday through Saturday except during a holiday week. However, all part-time employees hired prior to July 27,1974, shall have the discretion to work no less than twelve (12) hours a week except during a holiday week. Part-timers shall work no less than ten (10) hours a week during holiday weeks, except during weeks with Saturday holidays, when there shall be no minimum hours.

C. When additional part-time hours on a regular schedule are available preference shall be given, in the order of seniority to the part-time Employee, in the department (up to 32 hours a week), within the classification within the store, provided said employee is available on a continuing basis. Part-time employees interested in such additional hours shall submit a statement on a prepared form indicating hours and days available on a continuing basis. The assignment of additional hours, if practicable, shall be made among said part-time employees who submit such statements. This in

no way restricts the Employer from working employees across classifications.

Section 4.

Overtime. Overtime shall be worked and paid for when authorized by the Store Manager, the Assistant Store Manager, and Associate Assistant Store Manager or their designated person in charge. No one shall be compelled to accept overtime in the stores.

Section 5.

Evening Work. No Employee who is Full-time as of July 21, 1985 will be required to work more than two (2) evenings per week (after 8 PM.), except warehouse employees, present (as of July 27, 1985), Full time night stocking employees, night cleaners and night bakery employees.

Section 6.

Overtime Pay. Hours worked by Full-time employees in excess of forty (40) shall be compensated for at the hourly rate of one and one-half (1/2) times their regular rate for said excess hours, and in excess of thirty-two (32) hours in a holiday week. If there are two holidays during a week, overtime shall be paid after twenty-four (24) hours.

Section 7.

A. Call-in and Report Pay. When Full-time or Part Time Employees are called in for other than their scheduled hours, they shall be paid a minimum of four hours at the applicable rate. Reporting pay shall not be payable when the failure to provide work is beyond the control of the Employer.

B. Call-In Hours. Part-time employees who desire

additional call-in hours shall submit a statement on a prepared form indicating the days and hours available for call-in hours on a continuing basis, and a telephone number where said employee can be reached, from which group a list shall be established. The assignment of call-in hours shall be made, as far as practicable, from said list in order of seniority. Failure of a Part-time employee on said list to report in response to a call on two (2) consecutive occasions shall result in a removal of that Employee's name from the list for a period of two (2) months unless otherwise mutually agreed.

This procedure does not apply when the Company determines to assign hours on a hold-over basis.

C. Additional Hours. When additional hours of unscheduled hold-overs hours are available, they shall be distributed to the senior qualified part-time employee in the department then on duty.

Section 8.

A. Schedule. The schedules of all store employees shall be posted by 1:00 P.M. the Friday of the previous week in ink at the store time clock. The schedule listing shall be made by department in order of seniority. The schedule and any change therein shall remain posted for the entire week. Where changes are necessary, the Employer will make all reasonable effort to change the work schedules at least one day in advance; however, the Union recognizes that this will not be possible when factors are beyond the Employer's control, such as failure of the Employee to notify the Employer in reasonable time that he/she will not report for work. Any schedule changes for stock-taking will be made the Friday of the previous week.

B. Supper hours will begin no earlier than

3:30 P.M.

C. Employees assigned to early A.M. grocery stocking shall be scheduled no less than four (4) hours.

D. No employee shall be required to work a scheduled split shift. A split shift shall be defined as any shift where there is more than a sixty (60) minute break in the work schedule.

Section 9.

Sharing of Overtime. The Employer will continue its practice as to sharing of overtime within the department.

Section 10.

Rest Periods. Full-time Employees may take fifteen (15) minutes, for mid-morning rest period and fifteen (15) minutes for mid-afternoon rest period. Such period to include time for lunch, if desired Department Head will be responsible for arrangement of rest periods to assure that there will be no description of customer service. Part-time employees shall receive a fifteen (15) minute break during their work shift. Part-time employee who works a seven (7) hour shift shall be given two (2) fifteen (15) minute break in addition to lunch period. Relief periods shall be given as near as possible to the middle of the forenoon, after-noon, and evening work period. When overtime work is assigned to full-time employees after a regular work schedule, a twenty (20) minute break shall be scheduled immediately prior to the overtime and a fifteen (15) minute break each two (2) hours of overtime thereafter, except when said break coincides with the end of the work period; a third fifteen (15) minute break will be provided to all store employees when working a scheduled eleven (11) hour day. Breaks for cashiers shall begin when their cash drawer is

secured.

Section 11.

Schedule Changes. The Employer retains the right to alter the presently existing schedule of hours at its discretion where necessary, in its opinion, to the efficient operation of its business in the utmost of providing a better services to its customers at lowest cost to it. The Employer however, agrees that it will not institute any changes in the work schedule affecting any change in the substantial proportion of the Employees (such as a change in shifts or company-wide or store-wide changes for a substantial period of time in regular hours of employment) without affording the Union reasonable opportunity to discuss such a change prior to announcing such change.

ARTICLE 5
WAGES-WAGE PAYMENT

A. The rates of pay in effect during the term of this Agreement shall be those set forth in Appendix A hereto attached. All store Employees shall be paid in cash or check.

B. Paychecks shall be ready no later than 9:00 A.M. Wednesday except that if Wednesday is a holiday, Warehouse checks shall be ready not later than 2:00 P.M. on Tuesday and store checks shall be ready not later than 8:00 A.M. on Thursday. The employer agrees to arrange with an area bank to cash checks at no expense to the employee.

C. Vacation pay shall be paid in advance of the vacations and checks will be cashed in the stores, at no cost to the Employee. Warehouse Employees will be paid on the next to the last day of work, prior to vacation.

D. The employer may hire, on a store by store basis, at any rate on the wage schedules or at rates above the schedules and such hiring rate will be the minimum hiring rate for that store as long as that store retains that rate. When a store raises it's hiring rate for inexperienced employees in any job classification incumbent employees in that classification in that store who are below the new hiring rate will move immediately to the new hiring rate and thereafter progress to the next higher rate upon completion of six (6) months at the hiring rate, and will continue to the next higher rate each six (6) months thereafter until they reach the maximum rate.

When a store reduces a hiring rate for new hires, no incumbent employee will be affected.

An employee training a new employee who was hired at an increased rate under this provision will be paid not less than the increased rate during the training period.

Any part time store employee will be allowed to transfer to a store offering a higher starting rate.

The employer will notify the Union in writing prior to implementing higher wage rates. The employer retains the right to place newly hired employees at wage rates above the hiring rate based on prior relevant experience in comparable super markets, but not to exceed the top rate in Appendix A.

ARTICLE 6
HOLIDAY- SUNDAYS
SECTION 1.

The Employer agrees to recognize the following twelve (12) days as paid holidays under this Agreement, as hereinafter provided.

Major Holidays

New Years Day
Independence Day
Memorial Day
Labor Day
Christmas Day
Thanksgiving Day

Three Personal Holidays*

***Personal holidays shall be granted on two (2) weeks prior notice, except that the employer may, on a seniority basis, limit the number of employees taking a particular day if the demands of the business so require. Personal days may be used for an employee's birthday on two weeks prior notice. If an employee does not use his/her personal days they will be forfeited unless the employee is unreasonably denied a requested day.**

PART TIME

Employees hired on or after July 31, 1994 will earn personal days during their first year of employment. based on their period of employment, on the following non-cumulative schedule: one day after 3 months; one day after 6 months; one day after 9 months; three days, effective January 1, (after 6 months of service)

Personal holidays will be rescheduled if the employee is out sick or on funeral leave.

Minor Holidays

Patriots Day
Columbus Day
Veterans Day

Rhode Island Stores. In Rhode Island Stores, the holidays are the same, except the V-J Day is substituted for Patriots Day and is recognized as a major holiday.

Section 2.

Holiday Pay Eligibility - Full - Time Employees. In order to be eligible for holiday pay, an Employee must be a Full time employee and must have worked his/her last scheduled work day before, and the first scheduled work day after, the holiday, except for absence due to death in a family in accordance with Article 9 of this Agreement, or in case of proven illness in which case he/she must have worked at least one day during the holiday week. If a Full-time employee is injured on the job in a holiday week and is absent his/her scheduled work day before, or after, the holiday, or both, because of said injury, he/she shall not suffer the loss of holiday pay for that week only in which the said injury occurs.

Section 3.

A. Holiday Pay Eligibility - Part Time Employees. Part-time employees who have averaged twelve (12) hours per week during the eight (8) weeks prior to the two (2) weeks immediately preceding the week in which the holiday falls (including paid vacation, holiday hours, and paid sick leave shall be paid for the holiday according to the average number of hours worked during the aforesaid eight (8) week period as set forth below; provided that they have been employed by the Employer for six (6) months, and worked the last scheduled day before and the first scheduled day after the holiday, except for absence due to death in the family in accordance with Article 9 of this Agreement, or in case of proven illness, in which case they must have worked at least one day during the holiday week.

B. If a Part-time employee is injured on the job in a holiday week and is absent on his/her scheduled work day before, or after, the holiday, or both, because of said injury, he/she shall not suffer the loss of holiday pay for

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that week only in which the said injury occurs.

C. A Part time employee who is absent for part of the eight (8) week period due to a work related injury shall be paid holiday pay of at least four (4) hours (at least six (6) if employed for five (5) years or more) if he/she meets the above requirements for work during the holiday week.

D. A Part time employee who returns from a work related injury on the day after a holiday which is his/her first regularly scheduled work day in that week (excluding days absent because of proven illness or absence due to funeral leave in accordance with Article 9) is eligible for holiday pay of at least four (4) hours (six (6) if employed for five (5) years or more if he/she meets any requirements which apply for Full time employees concerning medical documentation of the accident.

Less than 24 hours - 4 hours pay
24 to 30 hours - 6 hours pay
30 to 35 hours - 7 hours pay
35 hours and over - 8 hours pay

E. Part-time Employees with five (5) or more years of service shall be paid a minimum of six (6) hours of holiday pay if they meet the above requirements for work during the holiday week.

F. Part-time employees shall not be disqualified from holiday pay by virtue of job related injury when otherwise eligible.

Section 4.

A. Work Performed on a Holiday or Sunday. If any work is performed on any of the minor holidays, all employees who work on such days will be compensated at the rate of one and one-half (1 1/2) times their regular rate of pay for hours worked in addition to receiving their

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regular weekly pay for the week but such hours worked shall not be counted as hours worked toward figuring weekly overtime. All employees hired before July 31, 1994 who work on major holidays will be paid the rate of two (2) times their regular rate of pay for hours worked in addition to receiving their regular weekly pay for the week but such hours worked shall not be counted as hours worked toward figuring weekly overtime. The foregoing shall also apply to store employees hired on or after July 31, 1994, except that the work on the holiday will be compensated at time and one half their regular rate of pay. For purposes of this Article, during holiday weeks the scheduled work week for all Full-time employees shall consist of thirty-two (32) hours, unless two holidays fall during the week, in which case the scheduled work week shall be twenty-four (24) hours.

B. If the Employer elects to open its store or a department within the store on Sunday, the Employees will receive one and one half time their regular rate of pay for all hours worked, such hours to be voluntary. Prior to implementing such a schedule, the Employer will notify the Union and discuss same. Employees employed as of November 6, 1988 as night floor cleaners will be compensated at two (2) times their regular rate of pay for night cleaning performed on Sundays as long as they are employed as night floor cleaners. Store maintenance employees will be paid double time for work on Sundays.

Section 5.

If the Employer wishes to call in full-time Store employees for added work on regular work days during a holiday week, all Store employees shall have the option of working the difference between the thirty-two (32) and forty (40) hours. Hours in excess of thirty-two (32) in a holiday week shall be paid at the rate of time and one-half

(1 1/2). In the warehouse time and one-half (1 1/2) shall be paid for work performed on the 5th work day in a holiday week (full time only) regardless of the number of hours worked.

Section 6.

Except for regularly scheduled shifts in the warehouse, and overtime scheduled in connection therewith, when a store or the warehouse is open on a Sunday, or holiday, Employees who work shall be paid a minimum of four (4) hours at the applicable rate.

Section 7.

When an Employee is requested by the Employer to work any Sunday or holiday, Employee shall receive the Sunday and holiday rates described above for hours worked, but such hours worked shall not be counted as hours worked toward figuring weekly overtime.

Section 8.

The Employer agrees to pay eligible employees holiday pay prior to the vacation where the holiday falls during the vacation.

Section 9.

The Employer shall follow industry practice within its geographic area with respect to store closing on New Year's Eve and Christmas Eve. Employees shall work up to forty-five minutes, as needed, beyond closing hours in the event of early store closing on said days.

ARTICLE *7*

VACATIONS

Section 1.

Employees shall receive the following paid vacations each year:

1 Year	1 Week
2 Years or more	2 Weeks
5 Years or more	3 Weeks
12 Years or more	4 Weeks
20 Years or more	5 Weeks

Eligibility shall be on the anniversary date of employment

Section 2.

Part-time Employee Eligibility. A part-time employee with less than five (5) years service as of the anniversary date of employment must have accumulated at least 250 hours (including vacation, holidays, and illness) during the year prior to his/her anniversary to be eligible.

Section 3.

Scheduling of Vacations. Vacations taken during the regular vacation season will be assigned on the basis of the Employee's Company seniority with limitations being placed upon such classifications as are necessary, in the opinion of the Employer, to properly effectuate the demands of the business. When a holiday falls during a vacation week the employee is to receive an extra day of vacation, either the last scheduled work day prior to that vacation or the first scheduled work day of the week that the employee returns to work at the employee's option and that week shall be treated as a holiday week for all purposes. The Employer will make its best efforts to schedule each full-time employee for two weeks of his/her vacation during the public school vacation, before any other vacations are scheduled.

Schedules for vacation shall be posted on April 15. Employees shall have an opportunity for the succeeding

two (2) weeks to indicate their vacation preference in order of seniority in their classification.

Vacations must be taken in the calendar year in which they accrue and may not be accumulated, except with the consent of the Employer.

Section 4.

Amount of Vacation Pay. Pay for vacation hours will be based on the regular weekly rate and schedule. Overtime shall not be counted in determining vacation pay. Vacation pay for Part time employees will be based on the average hours worked during the 52 weeks preceding their most recent anniversary. Weeks during which an employee was absent due to temporary illness or injury will be excluded from the calculation.

All part-time insurance deductions are to be taken out of the paycheck prior to the vacation.

Section 5.

An employee shall not be required to take his/her military training duty as his/ her earned vacation.

Section 6.

Accrued vacation pay shall be paid on termination except a discharge due to dishonesty.

Section 7.

Any employee with four (4) or more weeks vacation may take one week in vacation days. Full week vacations and personal days will take precedence over requests for vacation days.

ARTICLE 8

SICK LEAVE

Section 1.

A. All Full-time employees who have at least one

year of service as of January 1 , and who are actively employed will be credited with nine (9) days of sick leave effective each January 1, or on such later date when they resume active employment. Any sick leave which remains unused as of December 31, 1989 and each December 31, thereafter, will be reimbursed at full pay during the month of January provided the employee is still employed as of December 31.

B. Full Time employees who attain their first anniversary date after January 1 will be credited with one (1) day of sick leave for each full 45 calendar days remaining in the calendar year. Any days remaining unused at the end of the year will be reimbursed under the conditions set forth above. Employees who are promoted to full time during the year will be credited with one additional day of sick leave for each full 45 days remaining in the calendar year up to a maximum entitlement (inclusive of part time sick leave) of nine days in the year.

C. All Part time employees who have at least two years of service as of January 1 and who are actively employed as of January 1 will be credited with 24 hours of sick leave each January 1, or on such later date when they resume active employment. Any sick leave which remains unused as of December 31, 1989 and each December 31 thereafter, will be reimbursed at full pay during the month of January, provided the employee is still employed as of December 31. Part time employees who attain their second anniversary date after January 1 will be credited with two hours of sick pay for each full month remaining in the calendar year. Any hours remaining unused at the end of the year will be reimbursed under the conditions set forth above.

D. Any employee who has sick days or hours accumulated under the carryover provisions as of

December 31, 1988 will be allowed to maintain that existing balance. One half of any days remaining in a full time employee's current year sick leave allowance as of December 31, 1988 will be credited to the sick leave carryover up to a maximum carryover of 40 days. One half of any hours remaining on a part time employee's current year sick leave allowance as of December 31, 1988 will be credited to the sick leave carryover up to a maximum carryover of 100 hours. Sick leave shall be charged against current sick leave allowance until exhausted.

E. The anniversary date of Employees will be the Monday of the week in which the anniversary of their employment occurs. In the event an eligible Employee receives Worker's Compensation, the Employer agrees to pay only the difference to total a regular weekly wage.

F. Verifications of accidents or illness by medical authorities may be required by the Employer. Sick leave will not be computation of overtime compensation.

ARTICLE 9
FUNERAL LEAVE

A. In the event of a death in the immediate family of a full-time Employee, the full-time Employee shall be granted three (3) working day's leave without loss of pay which shall include the day of burial. A leave of five (5) work days without loss of pay, which will include the day of burial shall be granted in case of death of the spouse, child or stepchild of the Employee.

B. For the purpose of this Article, it is agreed that a member of the immediate family shall be considered to be the Employee's Father, Mother, Brother, Sister, Mother in-law, Father-in-law, Grandchild, or any member of the family residing in the Employee's home.

G. The date of notification of death of a member of the immediate family to those Employees who are on the job shall not be counted as one of the three (3) days funeral leave.

D. The Employer agrees that in the event of the death of a Grandparent, Son-in law, Daughter-in-law, Brother-in-law, or Sister-in-law, of any full-time employee, the Employee shall be granted one (1) work day off without loss of pay to attend the funeral. Part-time Employees shall be granted the same funeral leave benefits without loss of pay only according to hours they are regularly scheduled to work during this period.

E. An employee on funeral leave will be allowed to use sick leave, personal days, or vacation days as an extension of funeral leave.

ARTICLE 10
INSURANCE PENSION

Section 1.

A. (1) Full-time employees will be eligible for Shaw's Best Care Insurance provided by Pilgrim Health Care. Under that plan employees' payments for covered services provided by network providers based on referrals from the employee's primary care physician will be limited to $5.00 for each physicians visit and 10% of the cost of other covered benefits up to an annual out-of-pocket maximum of $250 per individual and $500 per family. Beginning January 1, 1996 the annual calendar year out-of-pocket maximums will be increased to $300 per individual and $600 per family. Employees will be held harmless from any balance billing by Pilgrim contracted hospitals or physicians, provided they comply with the referral requirements The Employer will provide a full maternity hospitalization benefit available under said plan.

(2) Non-emergency covered services from providers outside the network, or obtained from in network providers with-out a referral from the employee's primary care physician will be subject to the following payment arrangements: *Covered services will be paid at 70% of customary and regular charges after an annual deductible of $200 per individual and $400 per family, with annual maximum out-of pocket maximums limited to $1, 500 per individual and $3,000 per family. Beginning January 1, 1996 the annual calendar year out-of-pocket maximums under this paragraph will be increased to $2,500 per individual and $5,000 per family.*

(3) Charges for doctors visits, payments for prescription drugs, balance billings and charges for failing to follow utilization of referral procedures shall not be counted in determining whether the out-of-pocket maximums have been reached.

(4) The Employer shall provide coverage for dental care, for which all full-time employees shall be eligible on a family basis after one year service. Said dental plan will provide 100% payment for covered procedures when performed by a participating dentist.

(5) Full-time employees may take advantage of the Employer's opt out plan for medical insurance coverage beginning not later than October 1, 1994. Employees electing to exercise this option will receive additional payroll compensation of $100 per month in lieu of the insurance coverage provided above.

B. Part-time employees with six (6) months or more of service may purchase at their own expense individual or family dental coverage under the dental plan. After two (2) years of service the Employer will pay for the cost of individual dental coverage for part-time employees.

C. The Employer shall provide part-time

employees individual coverage under its insurance plan with the following eligibility requirements:

(1) All part-time employees hired before July 31, 1994 will be eligible after two years of service All part-time employees hired on or after July 31, 1994 shall be eligible after three years of service.

(2) No part-time employee, otherwise eligible, shall be afforded coverage who is presently or subsequently covered under any other group health insurance plan. Said coverage shall be subject to any non-duplication and/or coordination of benefits provisions in the insurance plan.

D. Part-time employees who are not eligible for Employer paid individual coverage may, after six months of employment, purchase at their own expense individual coverage under the above described medical insurance plan. Early retirees hired before July 31, 1994 and early retirees hired on or after July 31, 1994 who retire with twenty (20) years of Shaw's service may purchase, at their own expense, coverage under the above described medical plan, exclusive of the dental plan. Part-time employees who are eligible for Employer paid individual coverage may purchase family medical and dental plan coverage and will pay the additional cost over individual coverage. The Employer shall contribute 35% of the additional cost for part-time employees with five or more years who wish to purchase the family plan.

E. Full and part-time employees who were enrolled in HMO's as of July 16, 1991 will be entitled to remain covered under the plan in which they are enrolled as long as that plan is willing to provide group Insurance to Shaw's employees. The Employer will pay the cost of such HMO coverage for full-time employees with a contribution not to exceed the Employer's prevailing insured medical cost. For part-time employees with more

than two years of service the Employer will pay the cost of HMO individual coverage with a contribution not to exceed the Employer's prevailing insured medical premium for individual coverage. In the case of part-time employees with five or more years service who maintain continuing family coverage under an existing HMO, the Employer's contribution will not exceed 35% of the additional cost of family coverage under the Employer's prevailing insured medical and dental plans.

Section 2.

A. Weekly Disability. Effective on July 27, 1991, the Employer will provide full time employees with one year of service: Weekly sickness and accident coverage (by insurance or otherwise) in an amount equal to two-thirds of a normal week's pay, with a maximum of $330.00 per week for 26 weeks, effective after the Employee has exhausted Company sick leave, subject to the terms of the applicable insurance policy. This coverage shall not apply in the case of injury covered by Worker's Compensation Act.

B. Effective July 27, 1991, the Employer will provide part-time employees with two (2) years of service, who have exhausted sick leave benefits, weekly sickness and accident coverage (by insurance or otherwise) in the amount of $105.00 per week for twelve (12) weeks, to become effective the 8th day of absence due to illness or injury. This coverage shall not apply in case of injury covered by the Worker's Compensation Act.

Section 3. Life Insurance. The Employer will provide full-time Employees with one year of service, life insurance in the amount of $20,000.00. The Employer will provide part-time employees with two years of service life insurance in the amount of $10,000.00.

Section 4.

A. Pension. The Employer has established a Pension Plan for eligible full-time employees to provide past and future service benefits for each year of credited service, subsequent to January 1, 1975. Effective November 6, 1988. Employees will be eligible for up to a maximum of 40 years of credited service under the plan. The basic benefit will be $29.00 per month for all employees retiring between July 27, 1993 and July 30, 1996, and $32.00 per month for all employees retiring after July 31, 1996. A supplemental pension credit will be applicable to work performed in warehouse and store maintenance Positions. The multiplier for credited service in such positions shall be $34.00 for retirements from July 27, 1993 to July 30, 1996; and $37.00 for retirements on and after July 31, 1996.

B. Eligible part-time employees shall be entitled to future service pension benefits on a fractional basis for each year of credited service subsequent to January 1, 1976.

C. Employees who have retained profit sharing accounts will be given the choice of either rolling those funds into a 401(k) account or exchanging those funds for a past service benefit for all credited service prior to January 1, 1975 at the multiplier applicable in the years in which they retire, unless either or both of these options is not administratively possible or would result in an appreciable financial loss to any participant. Reasonable efforts will be made to accomplish these rollovers by December 31, 1991. The progress of this transition will be a subject for discussion in the Joint Labor Management Committee discussed in Article 10, Section 5.

D. Any future non-technical amendments to the Union pension plan shall be subject to approval by the

Union.

E. Neither the provisions of this Article nor any question as to the application or interpretation of any of said programs may be made the subject of a grievance or be arbitrable under this Agreement, Section 5.

Joint Labor Management Committee for Employee Benefits. The Union and the Company will establish a Joint benefits committee. Each party will designate up to five representatives to serve on the committee. The committee will meet bi-monthly between the effective date of the contract through the end of 1991. Thereafter, the committee will meet at least quarterly.

The committee will jointly determine agendas for each meeting. Minutes of each meeting will be kept and shared with the Union and the Company. The committee will prepare an annual report describing its findings and achievement. Members of the committee who disagree with the contents of the report may file a response which will be included as part of the report. This report will be distributed to the Union and the Company at the end of the month following the first, second and third years of the contract. The Company agrees to provide access to all Union-related employee benefit information, regarding employees within the collective bargaining unit. The committee is responsible for keeping this information confidential.

The committee will play an active role with bargaining unit employees in the implementation of any new employee benefit programs. The committee will review and assess all education programs related to bargaining unit employee benefit programs. The committee will assess the quality and costs of all employee

benefit programs, and recommend changes or modifications of these programs where appropriate.

A special study group will be established within the committee to evaluate the funding strategy and the investment strategy and financial performance of the Union-pension plan.

ARTICLE 11
UNIFORMS

A. Whenever the Employer requires the Employees to wear uniforms coats, aprons, or frocks, the uniforms shall be furnished and laundered by the Employer. Full time employees shall be furnished such laundered uniforms with not more than two (2) changes weekly, except that Employees in the meat rooms shall be provided daily changes and shall also be provided thermal vests, if requested, provided the Employees so requesting shall wear the vest. Meat Cutters shall be provided with protective aprons, and Employees assigned to Meat Room cleaning duties shall have coveralls available to them. Part-time employees will be provided uniform changes as necessary. Each Employee shall turn in the soiled garment in order to receive a fresh one and should use every precaution to keep said garment clean.

B. Thermal vests shall be provided to the primary person responsible for Dairy and Frozen Food.

C. Three protective aprons shall be made available to warehouse maintenance Employees when handling corrosive substances and shall be made available to porters as needed.

D. The Employer will have anti-corrosive footwear

available for the use of store and warehouse maintenance employees when working with acid.

E. Overnight Grocery Stockers shall wear and be furnished with Company polo shirts. (One polo shirt will be provided by the Employer for Wells Crew Employees between the months of May 30 and September 30),

ARTICLE 12
SENIORITY

A. When ability, availability and skills are equal, the principle of seniority is to govern in cases of lay-off and recalls within each job classification as a separate seniority unit. Meat cutters who would otherwise be laid off and who have previously served as second men may bump less senior second men in order to avoid being laid-off. For all purposes of this Agreement, seniority means the Employee's continuous service with the Employer beginning with the date of last hiring as an Employee without seniority and ending when:

(1.) The Employee quits or is discharged for cause; or

(2.) When an Employee is absent for more than two (2) days without having notified the Employer unless prevented from doing so by good causes; or

(3.) When the Employee is laid off or absent because of illness or other bona fide reason for more than one (1) year in case of full-time Employee or six (6) months in the case of part-time Employee, or unless Employer grants longer leave of absence;

(4.) When the Employee fails to report to work promptly on the expiration of any leave of absence unless such Employee secures an extension of such leave of absence with the consent of the Employer.

(5.) When an Employee fails to return to work

after lay-off within a week after the certified mailing notice of recall. Any notice required to be given by this Article, shall be considered given when the same has been deposited in the mail addressed to the Employee at his/her last known address as shown by the Employer's record.

(6) An employee promoted out of the bargaining unit shall lose seniority after ninety (90) calendar days for all purposes, except fringe benefits.

B. Full-time employees laid off because of lack of work when no other full-time work is available shall be offered part-time work at the rate applicable thereto if part-time work is available even if displacement of part-time employees is required. A full-time employee who accepts part-time work shall be given preference for reemployment for full-time work as if he/she were on lay-off. The Employer agrees that it will provide the President of the Union with three (3) copies of written statement of the names and addresses of each person hereinafter employed by it for more than six (6) days.

C. The foregoing principles shall apply to part-time Employees in each job classification as separate seniority unit.

D. Respecting promotions, the qualifications and ability of the Employee shall be considered in conjunction with seniority. The Employer agrees to make a sincere effort to train in advance senior Employees to fill future higher-rated classifications. Final determination on promotion shall rest with management which shall be the sole judge of qualifications, giving consideration to seniority and this determination shall not be subject to arbitration. Any Employee promoted or transferred to a higher rated classification who subsequently proves unsatisfactory in such higher rated classification, shall be returned to the position held first prior to the promotion

or transfer at the prevailing wage for this position with no loss of seniority rights. Employees promoted after July 27,1991 can step back only during the first six months.

E. When a full-time clerk is needed, preference shall be given to the senior part time Employee, provided the Employee is qualified and available for full-time work. When a full-time employee is needed in the warehouse, preference shall be given to the senior part-time warehouse employee who is either qualified and available for full-time work or who, in the opinion of the employer, could qualify after a reasonable training period.

F. Union employees shall have priority over nonunion employees for vacancies in Union stores provided the Employee is qualified for the vacancy. The Company will give the Union copies of all postings names of applicants and the successful applicant.

G. The Employer shall furnish the Union with an up-to-date seniority list for full time Employees and part-time Employees quarterly on request. When a full-time Employee has had prior continuous service as a part-time Employee before being appointed to full-time and has worked full-time for a continuous period of two (2) months he/she shall be credited for one (1) month of service for each two (2) months of part-time service for the purpose of lay-off by seniority, rate classification, sick leave, life insurance and disability insurance. When the part-time employee is made a full-time employee within the same department he/ she is credited with part-time service, one month for each two months of part-time service, for the purpose of lay-off by seniority, rate classification, sick leave, life insurance and disability insurance immediately upon assuming full-time status. These benefits shall not be applied retroactively. When a full-time Employee becomes a part-time Employee, he/she

shall retain his/her full length of service for all part-time benefits. Any part-time employee promoted to full-time after July 31, 1994 shall retain his/ her full vacation benefit.

H. When a part-time clerk is needed, the job will be posted within the store so that all employees within the store may notify management that they are interested in the position.

I. When a store employee transfers to the warehouse, he/she shall be placed at the bottom of the seniority list with no loss of company seniority towards benefits and wages.

J. When a warehouse employee transfers to the stores, he/she shall be placed at the bottom of the seniority list with no loss of Company seniority towards benefits and wages.

ARTICLE 13
GRIEVANCE ARBITRATION

A. For purposes of this Agreement, the word "Grievance" shall be deemed to mean only a dispute between the Employer and the Union and the Employees it represents concerning the meaning or application of this Agreement.

B. An effort shall be made to dispose of all grievances as soon as reasonably possible pursuant to the following provisions:

(1) The Employee, together with his/ her steward, or the steward alone, if he/ she wishes, within ten (10) calendar days after the occurrence of the situation, condition or action of management giving rise to the grievance shall meet with the Store Manager or Shift Supervisor to adjust the grievance. The Store Manager or Shift Supervisor will have five (5) calendar days after the meeting to answer the grievance.

(2) If the grievance is not resolved by the Store Manager's or Shift Supervisor's answer, the Union Representative will have seven (7) calendar days after receipt of the answer to notify the District Manager or Warehouse Manager that the grievance is being advanced to their level. The Union Representative will meet with the District Manager or Warehouse Manager, or their respective designees, within seven (7) calendar days after receipt of the notice to attempt to resolve the grievance. The District Manager or Warehouse Manager or their designee, shall be responsible for answering the grievance within seven (7) calendar days after their meeting.

(3) If the grievance is not settled at Level 2, it shall be reduced to writing and filed with the Director of Labor Relations within seven (7) calendar days of the Step 2 answer. The Director of Labor Relations shall discuss the grievance with a Union Representative and endeavor to settle the grievance. The Director of Labor Relations shall be responsible for giving an answer in writing within seven (7) calendar days after the conclusion of the discussion under Step 3. The Union will take this matter up at its next regular Executive Board Meeting to be held no later than the 15th day of the month after the Director of Labor Relation's answer and if the matter is not resolved it must be referred to arbitration within 14 days after the said Executive Board Meeting, but such referral may not be made by an individual employee.

C. In the event that either party (Union or Employer elects to submit a grievance to arbitration, the Arbitrator shall be selected and governed by the following procedures

D. If the parties do not agree upon an impartial arbitrator within seven (7) days, the matter shall be submitted to the American Arbitration Association for

appointment of an arbitrator and for hearings in accordance with its rules.

E. The decision of the Arbitrator shall be final and binding upon the parties hereto and upon any Employee, or Employees, affected thereby. The Arbitrator shall however, have no power either to add to or subtract from, or to modify any of the terms of this Agreement, or any Agreement made supplementary thereto. If either party contends that the above provision has been violated, the matter may be referred to any court of competent jurisdiction which shall have the power to determine the question and which shall interpret this agreement in accordance with the commonly accepted meaning of the words used herein and the principle that the parties are agreed that there are no restrictions intended on the management of the Employer other than those expressly set forth herein. The grievance procedure and arbitration provided for herein shall constitute the sole and exclusive method of determination, decision and adjustment of settlement between the parties of any and all grievances as herein defined.

F. Each of the parties hereto shall bear his own arbitration cost and one-half (½) of the fee and expenses of the arbitrator. Grievances, so far as practical, shall be taken up after working hours and no payment shall be made by the Employer for time spent by an Employee in dealing with grievances at such time; except a reasonable amount of time spent by Employees in routine adjustment of a grievance in working hours under the first step of the grievance procedure set forth in the preceding paragraphs of this Article shall be paid for by the Employer as though time worked; Steward's, or alternatively Chief Steward's, time in settling grievances during his/her regularly scheduled hours, under step one and two, shall be paid for by the Employer.

G. Nothing contained herein shall prevent an Employee from exercising his/ her rights under Section 9 (a) of the Labor Management Relations Act of 1947, as amended.

H. A grievance not initiated within the time limit specified, holidays excluded, will be deemed waived. Failure of the moving party to appeal a decision within the time limits specified will mean that the grievance shall be considered settled on the basis of the decision last made and shall not be eligible for further appeal. Failure of a party to answer or meet within the time limit specified will mean that the appeal may be taken to the next step immediately. This provision shall apply equally to grievances brought by the Employee, the Union. to the Employer.

ARTICLE 14
STEWARDS

A. The Union shall have the right to have one (1) steward in each of the Employer's stores covered by this Agreement, in the warehouse, one (1) for each shift, one for warehouse maintenance and one for store maintenance. The Vice President from the warehouse shall be the chief steward. The Union may designate an alternate steward in each store and on each warehouse shift; the alternate stewards shall be recognized by the company in the absence of the regular steward. A second alternate in the store and/or the warehouse may be designate if so desired by the Union.

B. In addition to their seniority right as regular Employees, Stewards and Union officers shall have top seniority if layoffs due to lack of work within their respective store and classification, or within their warehouse shift. Alternate stewards shall not have top

seniority.

C. No Steward or alternate shall be transferred unless such transfer is mutually agreed upon between the Employer and the Union. No more than one Steward or alternate per department shall be protected.

D. In no instance shall the Steward be discriminated against for discharging duties.

E. The Union shall supply the Employer with a list of the Stewards and the store locations. The Union will notify the Employer of all changes.

F. The Steward shall not in any way interfere with the Manager in his/her operation of the store.

G. The Union agrees to do everything within its power through advice, instruction, and examples to obtain compliance by its members with the obligations undertaken in this Agreement. The Employer agrees to do everything within its power through advice, instruction, and examples to obtain compliance by its Supervisors with the obligations undertaken in this Agreement.

H. The Union shall, within a reasonable period of time, be notified in writing of all suspensions and discharges after the probationary period.

I. The Union will conduct an annual seminar for stewards to be scheduled on a mutually agreeable date, which shall be a Monday, Tuesday or Wednesday and which shall not be in the week before a holiday. One steward per store, one steward for each warehouse shift, one steward for warehouse maintenance and one steward for store maintenance will receive one day off with pay to attend the seminar. The Employer will pay all said individuals.

ARTICLE 15
NO STRIKE- LOCKOUTS

A. It is mutually agreed by the parties hereto that throughout the life of this Agreement there shall be no strikes, lockouts, picketing, boycotts, or stoppage of work, and that any difference or misunderstanding as to meaning or application of this Agreement which may arise between the contracting parties shall be amicably adjusted by and between the parties themselves under the grievance procedure herein above provided.

B. In the event of the threat of, preparation for, or occurrence of any unauthorized strike, walkout, picketing, boycott. or stoppage of work, the Union and all of its officials will promptly take every possible step to prevent and to stop such action by any of its members.

C. It is further mutually agreed that the Employer shall have the unqualified right to take any action it deems advisable, including discipline and discharge, against any Employee engaging in, participating in, encouraging, aiding and abetting any such unauthorized strike, walkout, or stoppage of work. However, any issue of fact as to whether or not any particular Employee engaged in, participated in, or encouraged any strike or work stoppage, may be subject to the grievance procedure established by Article 13 hereof.

D. This Article shall not be construed so as to preclude the Union from engaging in lawful organizing activities at nonunion stores.

ARTICLE 16
JURY DUTY

Any full-time Employee who is called to serve for jury duty shall receive pay on actual hours worked for the Employer. If this pay, together with his/her jury duty pay, does not equal his/her regular five (5) day weekly rate of pay, the Employer shall make up the difference,

providing he/she works for the Employer during such hours when, because the jury is not sitting, he/she is reasonably available for work. However, the Employee shall not be required to work the sixth day if he/she serves on Jury Duty and/or works five (5) days or more in a regular week and he/she shall not be required to work the fifth day if he/she serves on Jury Duty and/or four (4) days or more in a holiday week. An employee on jury duty shall be granted holiday pay as if he/she were working regularly. Part-time Employees after one (1) year's service shall receive like benefits on a pro-rata basis. Days spent on jury duty shall be counted as eight hours worked for purposes of overtime eligibility. Part time employees will be paid jury duty pay for days served on jury duty on which they had been at work during the previous week.

ARTICLE 17
MISCELLANEOUS PROVISIONS

Section 1.

No Employee shall be obligated to use a privately owned vehicle for Company business.

Section 2.

A. Employees injured while at work and requiring outside medical service must first notify the store Manager, or Warehouse Supervisor, and shall be paid for time lost while visiting the doctor. If an Employee is required by the doctor to be absent from work, he/she shall be paid for the entire day, including lost overtime, if the injury occurs after the overtime begins.

B. Thereafter, the Employee shall be paid for time lost while visiting the doctor during his/he working hours for a scheduled appointment provided the Employee returns to work to complete his/her scheduled hours.

Section 3.

The Employer shall not enter into individual agreements with Employees with respect to terms and conditions of employment.

Section 4.

Safety Committee meetings shall be held monthly in the stores and in the warehouse for each shift. The Store Steward may attend the monthly store Safety Committee Meetings.

Section 5.

One bulletin board in each store and two in the warehouse shall be designated as Union bulletin boards.

Section 6A.

If an Employee is called in on his/her day off or temporarily transferred to another store farther from his/her home than is his/her home store he shall be paid twenty-seven and one half cents ($.275) per mile for each additional mile traveled except if the transfer is to avoid a layoff or is at the Employee's request.

Section 6B.

No Employee shall be permanently transferred more than 20 miles from his/her home store without his/her consent, except that transfers to staff new stores where the Union is recognized, and the first backfill, made during a three month period at the time of a store opening will be subject to a thirty mile limit, provided that Employees so transferred shall thereafter be paid twenty seven and one half cents per mile for miles in excess of 20. Thereafter the employee's former store shall be considered his home store until he is retransferred

back to within twenty miles of the home store.

Section 7.

There shall be a designated second person at each lunch counter.

Section 8.

Warning and suspension shall not be used for disciplinary purposes after 12 months.

Section 9.

Non-union personnel may perform work in accordance with past practice. It shall not be a violation of this provision to allow not more than two non-unit management trainees, per store, to perform bargaining unit work.

Section 10.

Covers will be provided for all cashier tills.

Section 11.

The Employer will not subject any Employee to a lie detector test, or request, directly or indirectly, any Employee to take a lie detector test. This does not apply to lie detector tests administered by law enforcement agencies.

Section 12.

It shall not be a violation of this agreement for the Employer to allow third party operation of leased departments, within its stores, staffed by employees of the leased operator, to operate specialized departments that can't be operated by Shaw's (e.g banks, pharmacies, travel agencies, hair salons, etc.).

Section 13.

Store cards or decals of the Union shall be displayed in a prominent place in all of the Employer's stores covered by this agreement, but these cards or decals shall remain at all times the property of the Union.

Section 14.

The Employer will notify the Union in writing of all terminations, suspensions, job postings and policy changes that affect the bargaining unit.

Section 15.

Safety and Health Committee.-

The Employer will cooperate with the Union in the joint operation of the Safety and Health Committee, which meets at least quarterly, which shall consist of members of management and union representatives. The Employer agrees to pay all employees their rate of pay to attend seminars that are developed by the Committee.

ARTICLE 18
MEAT DEPARTMENT

A. The Employer and the Union shall review the number of and activities of the Apprentice Meat Cutters so that Apprentices shall have an opportunity to progress in all phases of the meat business.

B. An Employee promoted to Apprentice Cutter shall maintain his/her rate 0' receive the starting rate listed in the Apprentice schedule, whichever is higher. If his/her rate is higher than the starting rate of Apprentice, he/she shall receive his/her next increase in pay after having served the required period of time in accordance with the Apprentice Progression Scale herein and shall thereafter receive the applicable progression rate and he/she shall receive all general increases. A warehouse employee will receive the applicable rate of a general duty

clerk for length of service or the beginning rate listed in the apprentice schedule, whichever is higher.

C. Store Manager will notify both Management and Union when starting an Apprentice Meat Cutter.

D. Meat room cleaning Monday through Friday will normally begin not before 8 P.M. and Saturday not before 12 noon except days of early closings and day before holidays where Saturday schedule will be followed.

E. Apprentice meatcutters may cut on Sundays, at the meatcutter rate, if no meatcutters are available.

ARTICLE 19
WAREHOUSE

Section 1.

A. Overtime-Warehouse: Employees must be notified of required overtime work prior to luncheon break on day on which overtime is required to be performed, or prior to leaving the warehouse on Friday where Saturday work is required.

B. If notified thereafter, the Employee may decline such overtime work at his/ her discretion. No notice required for one (1) hour overtime.

C. As far as practical, consistent with maintenance of the efficiency of the Employer's operations, overtime work will be rotated among qualified full-time Employees in the classification in question.

Section 2

1. Warehouse Hours: Employees may be assigned, by seniority, to regularly scheduled work weeks of five (5) days - eight (8) hours per day, or four (4 days - ten (10) hours per day subject to the following provisions.

A. Five (5) day week, forty (40) hour week. Time and one half (1 1/2) for work after forty (40) hours weekly and after thirty-two (32) hours in a holiday week

unless two holidays fall during the week in which case the scheduled work week shall be twenty-four (24) hours. Time and one-half (1 1/2) will be paid full-time warehouse Employees for time worked before and after their scheduled regular work day, as long as employees work their entire regularly scheduled shift. Management retains the right to alter schedules provided total remaining scheduled hours in the week are not cut.

(1.) Regular full time warehouse employees hired prior to July 27, 1982 shall be scheduled to work forty (40) hours on five (5) consecutive days, Monday through Friday or Tuesday through Saturday.

(2.) Full time employees hired on or after July 27, 1982 shall be assigned to work five (5) days, forty (40) hours per week with two days off, one of which shall be Sunday.

(3.) All employees hired or appointed after July 27, 1985 may be assigned to a scheduled shift ending no later than 7:00 A.M. Sunday. They will be given two consecutive days off the first of which shall be designated as the time and one-half (1 1/2) day and the second of which shall be designated as a double time (2) day. There will be no normally scheduled shifts between 7:00 A.M. and 10:30 P.M. Sunday. Any employees hired prior to July 27, 1985 that work between 7:00 A.M.. and 10:30 P.M. Sunday will do so voluntarily.

B. Four (4) day - ten (10) hour per day - forty (40) hour week. Time and one half (1 1/2) for work after forty (40) hours weekly or in excess of ten (10) hours in a day thirty (30) hours in a holiday week, unless two holidays fall during the week, in which case the scheduled work week shall be twenty (20) hours. Time and one half (1 1/2) will be paid full time warehouse employees for time worked before and after their scheduled regular work day as long as employees work their entire regularly

scheduled shift. Management retains the right to alter schedules, provided total remaining scheduled hours in the week are not cut.

B. (1) All employees on the four (4) day - ten (10) hour per day forty (40) hour week will have three days off; including Sunday,- two of the three days must be consecutive. The Company will work with the Union, through alternative scheduling, part time pickers and all other means possible to better suit all employees shift schedules.

B. (2) Holiday Hours 4-10's and Jury duty. The employee will be compensated in full days from the appropriate category not to exceed the following limits. (90) hours holiday, (30) hours personal day, and (72) hours sick pay in any combination, not to exceed a total of (170) hours pay.

Personal time may be used as sick time only after 50 sick hours have been used. If an employee goes back to the five (5) day, eight (8) hour day schedule his/her holiday hours and personal hours shall be recalculated back to what is left of the allowable (72) sick hours.

If an employees from five 5 day eight 8 hour day schedule to the four 4 day ten 10 hour day schedule and has no sick time left to convert to holiday hours, he/she shall be able to use Personal time to fill holiday hours.

The employee will be able to use the said (72) sick hours to be converted in order to receive ten (10) hours pay for his/her 9 holidays and 3 personal days.

The employee may declare twice a year the way in which these benefit hours will be used.

New Years day will be a mandatory ten hour paid holiday for all employee on the ten hour schedule. After such time the employee will be able to declare how he/she shall be compensated for his/her holiday pay.

If an employee goes back to the five (5) day, eight

(8) hour day schedule his her holiday hours and personal hours shall be recalculated back to what is left of the allowable (72) sick hours.

An employee working a four (4) day ten (10) hour day schedule shall not be required to work a fifth day if he/she serves on jury duty and/or works four (4) days or more, and he/she shall not be required to work the four hour day if he/ she serves on Jury Duty and/or three (3) days or more in a holiday week. An employee on jury duty shall be granted holiday pay as if he/she were working regularly. (All other references can be found in Article 16)

C. Each warehouse shift shall have its own start time which will be the same for all employees on said shift.

D. All warehouse employees shall be paid two times their regular rate of pay for work performed on major holidays or Sunday except that double time shall not be paid for regularly scheduled shift hours.

E. Full time employees shall be paid at the rate of one and one-half (1 1/2) times their regular rate of pay for hours worked on their scheduled day off other than Sunday.

F. There will be no pyramiding on overtime.

G. Premium pay of thirty-five ($.35) cents per hour will be paid all Employees on second shift. For purposes of this Agreement, second shift shall mean any Employee when their shift starts at 12:00 noon, or after.

H. Part time warehouse employees will receive overtime pay at time and one-half for all hours worked on their regularly scheduled days off (except Sundays and holidays) provided they work the regularly scheduled day before and the regularly scheduled day after the scheduled day off, except in case of injury or proven illness or death in the family under Article 9. After 36

hours the employee's base is increased by 30%.

Section 3. Part-Time Pickers

The Company may use part time pickers under the following circumstances:

1. a. Part time pickers may be used only when the thirty four (34) reduced hour full time employees referred to in the 1994 warehouse side letter are all moved to forty (40) hour status.

b. In the first two years of the contract there may be a 10% ratio of part time picker's to the full time union work force, as reflected on the Full time seniority list

c. In the third year of the contract there may be a 15% ratio of part time pickers to the full time union work force as reflected on the full time seniority list, provided that the full time seniority list at the East Bridgewater Distribution Center includes not less than 227 individuals. If the number of individuals on the full time seniority list drops below 227 then the allowed percentage of part time pickers drops to 10%.

d. Part-time pickers will only be allowed to select unless the print is complete in which case the Company may assign them other General warehouse duties in accordance with the shape up procedures.

e. Part-time pickers will work the least desired shifts and schedules that the full time employees do not wish to work.

f. Part-time pickers will not perform classified jobs.

g. Part Time pickers shall work a maximum of three days in a work week.

h. Part Time Pickers shall work a minimum of 16 hours and a maximum of 24 hours per week, except as provided under paragraph (1).

i. Part Time Pickers shall work no less than six and no greater than ten hours per day.

j. All schedules shall be honored by seniority.

k. Holiday Week: Part time pickers shall be scheduled at a minimum of 16 hours in a holiday week and maintain their holiday pay.

l. Part time pickers can only work additional hours to relieve forced overtime situations when all other means have been exhausted Part time pickers cannot be forced to work additional hours.

m. Part-time pickers will be paid at the applicable Part Time Picker wage scale.

n. Part time pickers will be given their schedules seven-(7) days in advance.

o. There shall be a three (3) week notice of lay-off

2. The Company agrees to work with the Union to eliminate the split work week on the third shift, through either alternative scheduling or any other means possible. There will be no split work week for third shift employees on a five (5) day Schedule during any week in which part time pickers are actively employed in the East Bridgewater Distribution Center. During the first two (2) years of the contract for each two (2) part time pickers actively at work the most senior employee on the five day split shift will be taken off the split shift work week. In the third year one employee scheduled for five (5) day split work week on the first or second shift will be entitled to two consecutive days off for each part time picker actively working in the East Bridgewater Distribution Center.

Section 4.

A. Vacations Taken During Holiday Week: When

an Employee's vacation is taken during a holiday week, the warehouse Employee shall, at his/her option, receive a day off with pay immediately before of after his/her vacation or one (1) extra day's pay. If the employee chooses to receive a day off with pay, it shall be treated as a holiday week for all purposes. Such option shall be exercised at the time of the selection of the vacation period.

B. Overtime: Employees working overtime on day shift will not get additional night shift differential.

Section 5.

1. Vacation Days:

East Bridgewater Distribution Center employees may take separate days as vacation days. Vacation days are defined as a week of vacation taken as separate days. Once one day is used, the remainder of that week's days are automatically classified as vacation days.

Regarding the scheduling of vacation days, the following shall apply:

a. All regular full week vacations have preference over requests for vacation days.

b. Vacation days will be assigned separately from normal vacations; Normal vacations taking precedence.

c. A vacation day can only be used on a day which the employee is regularly scheduled to work.

d. Vacation days will be scheduled in the same manner as vacations. To lock in a vacation day two (2) weeks notice will be required. Shift seniority will prevail. Management may grant additional days with less than two (2) weeks notice.

e. Vacation days are not to be used as substitutes for sick days.

f. Vacation days and vacations will not exceed the shift vacation maximum without management's approval,

except that a limit of one half the shift vacation maximum may be applied to two peakdays per week, as designated by the employer on a quarterly basis.

g. Vacation days will not be paid in advance.

h. If the shift compliment for scheduled time off is not filled, then one (1) day's notice is required. Seniority shall govern.

i. Upon two week's prior notice, personal days will take precedence over vacation days.

2. (a) The first four (4) vacation days for five day employees will be paid at eight (8) hours and the fifth will be paid at eight (8) hours plus all additional average hours per week worked from the previous year.

(b) The first three vacation days for employees on a four day schedule will be paid at ten (10) hours and the fourth will be paid at ten (10) hours plus, all additional averaged hours per week worked from the previous year.

2. Seasonal Vacation Sign up: There will be a four (4) seasonal sign up for vacation time, as follows:

1. January, February, March
Sign up lime: by December 1st
2. April, May, June
Sign up time: by March 1st
3. July, August, September
Sign up time: by May 1st
4. October, November, December
Sign up time: by September 1st

During each of these sign up periods, the employee will be locked in by seniority and may not be bumped off. After these sign up periods, the 2 week sign up for vacation approval and lock in will apply, seniority shall govern the choice. The dates of these sign up periods will be posted annually. Seasonal periods and sign up dates may be changed by agreement of Employer and Union.

Section 6.

Special Warehouse Provisions:

A. General Seniority Provision:

1. The current seniority list as established for Employees remains unchanged.

2. An Employee's seniority will commence the first day of his/her employment if he/she is retained beyond the thirty (30) working day probationary period, or sixty (60) working day probationary period where mutually agreed.

3. A list showing Union seniority in the Company will be posted and kept current by the Employer.

4. A warehouse Employee promoted out of the bargaining unit shall lose seniority after ninety (90) calendar days for all purposes, except fringe benefits.

5. When an Employee is absent and the Employer elects to fill that vacancy by an overtime assignment, the Employer shall give preference to Employees in the same classification on the prior shift to replace the absent Employee. If there are no volunteers from the same classification on the prior shifts, the work shall be offered to another senior qualified employee on the prior shift.

B. Job Promotion

1. The Employer shall permit Employees, on the basis of seniority to train for skilled jobs (defined as forklift operator, slip sheet operator, shipper, receiver, and full time porter and cigarette department) that may be available during the life of this contract, if, in the opinion of the Employer, such Employee, after a reasonable training period, can qualify for the job. Qualified warehouse Employees shall have preference for any truck driver jobs if such become available. The judgment of the Employer shall be final and not subject to arbitration.

2. If in the opinion of the Employer there are no

Employees in the Department who can qualify, after a reasonable training period, for the skilled job available, the Employer shall have the privilege of employing a person who may meet its requirements of skill. The judgment of the Employer shall be final and not subject to arbitration.

C. Lay-off: In case of lay off in any of the job classifications set forth below, the least senior Employee in the job classification may bump a less senior Employee in any other job classification, providing the bumping Employee could in the opinion of the Employer qualify for the job after a reasonable training period. The Employee so replaced may exercise his/ her seniority in the same manner. The job classification shall be as follows:

Forklift Operator
Slip Sheet Operator
Shipper
Receiver
General Warehouseman
Cigarette Department
Full-time Porter
Washer/Scrubber
Truck Driver (if created)

Seniority shall be determined by the length of service in the warehouse.

D. Permanent Reduction In Shift: In case of a permanent reduction in the number of Employees assigned to a particular job classification on a shift, the Employer will first post any vacancies of the same classification on other shifts. If the excess number of employees on a job classification remains after posting and filling such vacancies, the excess junior employees on the classification and shift involved may displace any less senior Employee on any other job classification,

providing such Employee could in the opinion of the Employer qualify for the job after a reasonable training period. The employee so displaced shall have the same rights.

E. Job Bids.

1. When an opportunity for a regular permanent part-time or full-time job exists, the Employer will post a notice announcing the job opportunity. The notice will remain posted for two (2) regular work days. All job bids will be awarded within forty-eight (48) hours after the close of the Posting period. All job bids will state the job, shift, department, whether temporary or permanent, the date and time of posting, and in case of temporary vacancies, the approximate starting and ending dates, if known.

2A. Seniority Clause: When new jobs are created or temporary or permanent vacancies occur, the most senior Employee in the point of warehouse service who bids shall be given a reasonable training period to qualify. Management shall be the final judge of ability. An Employee may bid at all times on posted opening which is a higher paying job, but shall be restricted to no more than two temporary bids per year and two permanent bids per year to equal or lesser paying jobs.

2B. If an Employee bids on a job and is found qualified but elects not to accept the job, he/she waives his/her right to bid on other jobs for a period of one year. Temporary vacancies caused by a vacation shall be assigned to the senior qualified Employee from within the shift desiring such assignment. Other temporary vacancies of more than two weeks shall be posted for bid in accordance with paragraph E.1. Other temporary vacancies of two (2) weeks or less (except where filled by an overtime assignment) shall be assigned on a weekly basis to the senior qualified Employee within the shift

desiring such assignment. The Employee temporarily assigned (except for vacancies of more than two (2) weeks which are filled by bid in accordance with paragraph E. 1.) shall be paid the rate of his/her regular job or the rate of the job to which he/ she is assigned, whichever is higher.

In case of a transfer from one shift to another, the Employer shall first ask for volunteers; if there are no volunteers, junior qualified Employee may be assigned to the other shift.

2C. Seasonal Employees employed between May 1 and September 30 shall not be subject to the layoff, recall, bidding or assignment provisions of the seniority articles of this agreement. In principal there shall not be more seasonal Employees than there are regular Employees allowed on vacation per week. The Union recognizes that each week the numbers of Employees on vacation and seasonal Employees may not be the same because of how regular Employees choose their vacations. The Employees will be Union members after 30 days and subject to any rights under this agreement except layoff, recall, bidding and assignments. Four weeks or less at the Employer's discretion, from the date of hire, seasonal Employees shall be required to work overtime before regular Employees are forced.

F. Additional Provision

l. Safety mesh must be installed over head of the forklift operator.

2. The Employer shall provide proper maintenance of machinery

3. Supervisors in the warehouse may perform production work in accordance with past practice.

4. An Employee who takes over the supervisor's job during sickness or vacation will receive a guarantee of seven (7) hours of overtime per week.

5. The Company agrees to work with the Union to eliminate the split shift work week at the East Bridgewater Distribution Center.

6. Overtime, holiday and other pay shall be based on the Employee's wages, plus his/her regular shift differential.

7. The Employer shall schedule hours on Christmas Eve and New Year's Eve, so that the warehouse will close at 7:00 P.M.

8. Newly hired Employees will be trained on the shift to which they will be assigned unless the Union and Employer agree otherwise.

9. Within each classification, it is the intent of this Agreement that as long as ability and qualifications continue to be substantially equal, selection by the Employee to perform jobs within the classification shall be made with preference given to the senior Employee. The Employer shall have the right to shift an Employee from the job he/she is performing to any other jobs within the classification as the necessity for the same arises, provided, however, that seniority shall govern the choice

10. There shall be a training period for temporary supervisors of no more than 90 calendar days, during which time they will remain in the Union but shall not do any Union work.

11. Equipment Allowance: Effective July 31, 1994 the Employer shall pay $100.00 equipment allowance per contract year for all warehouse employees with one or more years of service who request same provided where payment is made, Employees will be expected to wear the equipment while at work. Equipment is defined as: shoes, jackets, vests and all clothing related to work performed at the warehouse. Employees will be eligible for their reimbursement, upon presentation of their receipts, on their anniversary date.

Letter of Understanding: Employees with an anniversary date in August or September 1994 may turn in their receipts, on or before October 1,1994: for the first year only.

12. There shall be two five (5) minute wash-up periods in the warehouse, as is the current practice.

13. Permanent part-time vacancies shall be offered to part-time Employees who request in writing in order of seniority.

14. Full-time warehouse and all full-time maintenance vacations shall be calculated based on average hours paid during previous calendar year but not less than forty (40) hours per week.

15. SEASONAL EMPLOYEES: Full time seasonal employees working in the warehouse under Article 19, 4(E)(2) (C), will be paid at a rate of pay no less than $4.00 under the top rate of pay for the general warehouse classification and no more than the starting rate for that classification. Part time seasonal employees working under the same provision shall be paid no less the $2.00 under the part time rate and no more than the regular part time rate. All seasonal employees working in a classification will be paid the same rate. Regular part time employees who work full time during the summer season will be paid the starting rate, and, after two (2) months, the appropriate rate giving credit for prior part time service as specified in Article 12. F

G. Maintenance Provisions

1 . When maintenance Employees are called in, they will be paid a minimum of four (4) hours at one and one-half (1 1/2) times their regular rate of pay but such hours worked shall not be counted as hours worked toward figuring weekly overtime. The Union agrees to give the Company the right to give maintenance employees, called in on a service call, additional work if

the service call is completed within the 4 hour minimum.

2. Overtime and call-ins will be shared equally within each classification. The company agrees to pay a minimum of one (1) hour at the appropriate rate for any work performed in regards to telephone or computer network after the regular shift.

3. The Company will provide winter clothing, including: thermal vests, cover-alls, gloves, boots, rain gear and coats. The company also agrees to replace these items listed above when they become worn out, as needed. The Company and the Union will establish one standard name of clothing for these purposes. In addition all maintenance Employees who work in battery room shall upon request be given one pair of safety shoes per contract year, if needed.

4. A. Maintenance Employees shall have a separate seniority unit. Employees in maintenance as of July 27, 1979 will have their date of hire as their seniority date. Employees entering the Maintenance Department, thereafter, shall have the date of entry as their seniority date. This seniority is for competitive purpose only. (Choice of shifts, vacation, day-off).

B. Maintenance Employees who leave the maintenance department will go to the bottom of the warehouse or store seniority list. Company seniority will be used for benefits. Transfers between warehouse maintenance and store-maintenance will be without loss of maintenance seniority.

5. The work week for maintenance Employees hired or appointed prior to July 27, 1985 shall be forty-two and one half (42 1/2) hours per week, five (5) days, time and one half (1 1/2) after eight (8) hours in a day, forty (40) hours in a week, thirty-two (32) hours in a holiday week, and twenty-four (24) hours in a week with two (2) holidays. Maintenance employees hired or

appointed after July 26, 1985 shall work eight (8) hours a day, forty (40) hours a week; thirty-two (32) hours in a holiday week; twenty-four (24) hours in a week with two (2) holidays. The Union agrees to allow the Company to offer a 4 day 10 hour per day work week schedule to existing maintenance employees, on a voluntary basis only. New hires in the maintenance department may be scheduled on a 4 day 10 hour per day work week schedule Once a new hire is put on (his 4-10 schedule, the split shift will be eliminated in the maintenance department.

6. Maintenance employees shall be provided with safety prescription lenses as needed but no more than one (1) pair per year. The Employer agrees to pay an amount which would be paid to the Company eye doctor to a private eye doctor to pay for photogray lenses if prescribed by a doctor and for safety frames if needed, subject to OSHA standards.

7. Tools: The Company agrees to a one, time payment of $100 cash or up to $200 with receipts for (the purchase of tools. New mechanics hired from within the bargaining unit: One time payment of $100 cash or up to $200 with receipts for the purchase of tools. The Company will replace broken or worn tools upon presentation of said tools and lost tools will be replaced at the discretion of the Maintenance Manager.

8. The Union agrees to allow maintanence employees to operate forklifts to perform maintenance related tasks as long as there is no displacement of warehouse workers. Said work is to be performed when the machines are idle.

The Union agrees to allow the maintenance department to sweep the parking lot, as long as it is not a permanent 8 hour per day occurrence. General mechanics will be responsible for the painting of material handling equipment and racks in EBDC.

9. a. The company agrees to provide training as needed on updated equipment or any job related changes which affect maintenance employees.

b. The company shall continue to offer training and education for maintenance employees who desire to be certified in the trades: HVAC, welding, plumbing, electrical, refrigeration, etc.

10. The Company will provide the Union with a letter of understanding in reference to outside contractors.

ARTICLE 20
MANAGEMENT

The Employer retains the sole right to manage its business including, without restricting the foregoing, the rights to decide the number and location of its warehouses and stores; the equipment to be used; the functions to be performed; the products to be manufactured, purchased, merchandised or otherwise dealt in; the method of operations; the schedule of operations, the processes of handling, manufacturing, or assembling; and the control of raw materials, semi-manufactured and finished goods which it may determine to incorporate into the products manufactured, purchased, merchandised or otherwise dealt in by it; to maintain in order and efficiency in its operations; to hire, assign and promote Employees; to lay off, recall and transfer Employees for legitimate business reasons; to discipline; demote and discharge Employees for proper cause; and to determine the starting and quitting time and the number of hours to be worked; subject governing the exercise of these rights as are expressly provided in this Agreement.

ARTICLE 21

SCOPE OF AGREEMENT

All of the contractual commitments of the Employer with reference to all matter of wages, hours, and other conditions of employment have been integrated and incorporated into this Agreement those matters not specifically referred to herein having been raised and disposed of-provided, however, that nothing in this Agreement shall prohibit, the Employer from granting the Employees covered hereby more favorable wages, hours or other conditions of employment than those which it is contractually bound to provide hereunder in the event that, at its sole discretion, the Employer determines to do so.

ARTICLE 22
SEPARABILITY AND SAVING PROVISION

If any Article or Section of this Contract, or of any Riders thereto, should be held invalid by operations of law or by tribunal or competent jurisdiction, of or compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this contract and of any Rider thereto, or the application of such Articles or Section to persons or circumstances other than those as to which it has been held invalid, or as to which compliance with or enforcement of has been restrained shall not be affected thereby. In the event that any Article or Section is held invalid or enforcement of or compliance with which has been restrained, as above set forth, these parties affected thereby shall enter into immediate collective bargaining negotiations upon the requests of either party, for the purpose of arriving at a mutually satisfactory replacement of such Article or Section during the period of invalidity or restraint.

ARTICLE 23
MILITARY LEAVE

Section 1 Emergency National Guard Duty. An employee called to National Guard Duty because of local emergency by decree of the State shall suffer no loss of basic pay. The Employer shall make up the difference between the employee's regular weekly pay and military pay.

Section 2 - An employee shall not be required to take Military Training Duty as his/her earned vacation. If a holiday provided for in this agreement falls during an employee's two (2) week training period, the week immediately following shift be that employee's holiday work week.

Section 3 - An employee shall not suffer any loss of pay for attending two week summer duty. the Employer shall make up the difference between the employee's regular weekly pay and military pay.

ARTICLE 24
DURATION

This Agreement shall become effective as of July 31, 1994 and shall remain in full force and effect through July 27, 1997 and shall thereafter be continued for successive one year periods unless notice in writing, by registered mail, is sent by one party to the other of the desire to terminate or modify this Agreement at least Sixty (60) days prior to the next expiration date on this Agreement. Upon receipt of any such notice, a conference will be arranged for within ten (10) days.

IN WITNESS WHEREOF, the parties hereto caused their hands and seals to be place hereon by their

duly authorized representatives and officers this 16th day of August 1994

SHAW'S SUPERMARKETS, INC.
(Southern Region and East Bridgewater Distribution Center)
Richard Pires, Director of Labor Relations

UNITED FOOD AND COMMERCIAL WORKERS UNION
LOCAL 791, AFL - CIO
Russell Regan
President
Robert Anderson
Warehouse Vice President
Frank J. Runey
Store Vice President
Peter Derotien
Secretary
Lynette Chancholo
Treasurer
Richard Cerci
Full Time Negotiator
Mary Tamulevich
Part -Time Negotiator
Jack Picciuto
Meat Department Negotiator
John C. Franzen
Warehouse Negotiator
James Pinardi
Warehouse Negotiator

The Union and the Company agree that the following shall be an addendum to the current collective bargaining agreement:

1. Any member of the Union who is elected or appointed to a Union office, Business agent, Office staff,

Delegate to a Union Convention or who is assigned to participate in negotiations, grievance or arbitration shall be granted a leave of absence from the Company for the term of office and any subsequent terms.

2. The company agrees that any full time Officer granted a leave of absence in accordance with Paragraph 1, above, who leaves office for any reason except for moral turpitude, shall return to the Company and be reinstated the last held position, at the current rate with no loss of seniority or accrued Benefits, providing that an application for said return is made within thirty (30) days following the leaving of office.

3. The Company agrees to allow the Union to purchase, at the applicable group rate, all applicable health and life insurance and pension benefits.

4. Duly authorized representatives of the Union shall be granted reasonable access to all stores and the warehouse contained within the collective bargaining unit to conduct Union business provided that such access shall not interfere with production or with employees while at work.

5. Weeks in which an employee was temporarily absent due to Union business will not be included in the base for calculating holiday or vacation pay, provided that the payroll department receives notice, at least one week prior to the vacation or holiday week, listing the weeks which should not be included in the calculation. In the event that temporary time off for Union business would have resulted in additional pension credit if the time had been spent working for Shaw's, the Union may purchase additional credits, in quarterly increments, for the affected individual by making a contribution to the Fund in the amount of the cost of the purchased credit.

Russell Regan
United Food and Commercial Workers Union, Local 791,

AFL-CIO
Rich Pires
Director of Labor Relations
Date:_____

TO BE PRINTED AS AN ADDENDUM TO THE NEW AGREEMENT

Mr. Russell Regan
President United Food and Commercial Workers Local 791
Dear Russ:
I am writing to confirm that we reached the following agreements that are part of the 1994-1997 agreement as if incorporated therein:

1. Shape ups will be conducted by the use of choice sheets to be filled out one time per month, twelve (12) times a year. Choice sheets will be effective the first Sunday of each month. It is the employee's responsibility to turn in the new choice sheet at least seven (7) days prior to the start of the new month. Employees will be allowed to turn in only one choice sheet per month Employees will be allotted ten (10) minutes each month to fill out choice sheets. Available work will be assigned on the basis of preferences expressed on the choice sheets, in order of seniority. Employees will begin their assignment at the end of the start-up period. If a job is eliminated during a shift, the affected employee will be assigned to available work in accordance with the preference expressed on the choice sheet. This provision will not be used to bump an assigned employee, except when such bumping is necessary to prevent the assignment of a senior employee to selecting, or to prevent assignment of a senior employee outside of classification. If an employee bids to a new shift, he will be allowed to fill out a new

choice sheet.

2. General Warehouse Utility Jobs:

a. If a new utility job is created the most senior employee, by choice sheet, will be assigned that job.

b. The breakdown is given to the Steward by the Supervisor prior to the shift. The Steward assigns (micro shape up) utility jobs and these jobs are posted with the shape up.

c. Utility Jobs are for the General Warehouse classification only.

d. If the Union feels the Company is abusing this procedure the Company must return to the original bumping procedure as in preference of a job within the classification, by seniority.

3. If the most senior employee's first choice was not available at the start of the shift, he shall have the right to refuse that job for the remainder of the shift.

4. Clean up shift - last hour of the shift, all the orders are out: As employees turn in orders they will be assigned to help the most senior employee selecting. When all the selectors are assigned help, the next employee who goes to the window will be assigned duties according to the choice sheets. (Clean up shift will be defined as the shift finishing the pick print).

5. The Company agrees that Employees will retain their seniority during shift overlaps.

2. MEAT CUTTERS: The company will honor its past practice as to only meat cutters and apprentices doing production cutting. Grinding of meat will not be a regularly scheduled part of the work will not be a regularly scheduled part of the work the full time general duty clerk, except the end of the shift if no meat cutter is available or in case of emergency.

3. PROPOSALS: All proposals by both parties not granted were withdrawn as it not proposed.

4. DENTAL PLAN: The yearly cap on benefits will be increased from $500 to $750 effective November 6, 1988.

5. PENSION: The Pension Plan will provide for early retirement at age 62 without penalty, for retirements after November 6, 1988, and will provide that an employee shall be credited with a full year of service in any year in which he or she works 1560 hours.

6. CREDIT UNION: The Company will make payroll deductions available for a Union credit union or another designated credit union, in lieu of the current availability of direct deposit.

7. CHECK OFF: The Company will provide new hires a check off authorization card as part of the hiring process, will explain that Union membership (payment of initiation fee and dues) is a condition of employment, and that the easiest way to comply is to sign the check off card. The Union will provide check off cards in multiple copies; the Company will retain one signed copy and forward the other ones to the union.

8. NEW STORES: When the Employer opens new stores within the geographic area described in Article 1, the Employer will allow access within the store prior to opening during the hiring process, will remain neutral, and will recognize the union and apply the contract when a majority of employees have authorized the Union to represent them.

9. MAINTENANCE CLOTHING:

When the present clothing contracts expire for store and warehouse maintenance employees the Company will check with suppliers as to the availability of light and heavy clothing and, to the extent available from suppliers. The Company will allow maintenance employees to make seasonal selections, it being understood that the employee is held to the selection for a season.

10. It is agreed that the change in Article 6, Section 4(A) will not affect the arbitration of Case 1894-87. The arbitrator's decision in that case will be binding during the term of the new agreement.

11. The Company and the Union agree that Sunday and Holiday work will be assigned as in the past.

12. The Union agrees that it will not grieve the continued use of nonbargaining unit personnel to perform store inventory work and that it will withdraw Grievance Number 401 from arbitration with prejudice.

13. The Union agrees to withdraw Grievance Number 431 from arbitration without prejudice or precedent.

14. Reclaim jobs will be posted for bidding first by active store employees and second by active and laid-off warehouse employees.

15. The parties have agreed on the following resolution of their disputes over floor cleaning work:

a. The Employer will establish two full time floor/meal room cleaning positions in each store- one to be designated primary floor cleaner and the other secondary floor cleaner.

b. The vacancies in those positions will be posted for bidding with the following priority full-time store employees part time store employees; active and laid-off warehouse employees.

c. Floor cleaners appointed prior to July 27, 1991 will maintain their existing conditions (including wage rate, weekly work schedule, and double time provisions if applicable) as long as they remain in the position in which they were employed on July 27, 1991. Any Sunday floor cleaning work available in stores staffed by employees employed as night floor cleaners prior to July 27, 1991 will be offered first to those employees.

d. Night floor cleaners hired or promoted, after July 26, 1991 will be subject to work schedules which include

Sunday work as part of their 40 hour week. Any work on Sunday will be paid at time and one-half.

e. Outside contractors may be used for floor/meat room cleaning in the event the Employer is unable to obtain an adequate number of employees to do the work.

f. The grievance protesting the performance of floor cleaning work by outside contractors will be withdrawn with prejudice.

17. The Company and the Union will negotiate a mutually agreeable maintenance apprentice program. The possibility of additional wage increases for maintenance employees in the third year of the agreement may be included in these negotiations.

18. The following 1982, 1985, 1991, understandings are hereby continued but shall not be subject to arbitration.

1982 SIDE AGREEMENTS

1. Filling the day shifts from second and third shifts.
2. Radios in the warehouse
3. Definition of the cigarette department selecting, stocking, stamping.
4. Company will be sensitive towards forced overtime on weekends and daily.

1985 SIDE AGREEMENTS ARTICLE

SECTION 3B - Managers will be sensitive to the needs of senior citizens and part-time employee more than five days but reserves the right to schedule six days when it must be done.

SECTION 3C - The Company will be sensitive to the desire of senior part time employees for more day hours.

SECTION 5 - Full time night stocking employees,

night cleaners and night bakery employees (as of 7/27/85) will not be required to work more than two (2) evenings per week in other classifications.

SECTION 5 - Present night stocking crew will not be forced to evenings and lose the premium,

SECTION 5- Full-time night stocking employees that want to go to evening stocking will have a preference but lose the premium.

SECTION 8A - The Company will be sensitive and give reasonable notice to employees.

SECTION 8 - Nine hours off between scheduled shifts: The Company agrees they will be sensitive in this area
(Unless the employee agrees).

SECTION 8 - The Company will undertake some sensitivity in the desire of senior cashiers not to pack.

ARTICLE 6-

HOLIDAYS AND SUNDAYS

SECTION 1 - The Company will be sensitive to those employees who demonstrate a sincere interest in the cause represented by the observance of Martin Luther King Day, The day off without pay.

SECTION 4 - The Company agrees that the manager will be sensitive to employees who want to work not more than four days in a holiday week and not more than three days in a week with two holidays.

ARTICLE 7-

VACATIONS SECTION 3-

The Company has agreed that store managers will not automatically deny vacations during holiday weeks. We have agreed that store managers will look at each vacation request as a separate entity and where practical we will allow vacations during those holiday weeks.

ARTICLE 11 - UNIFORMS

The Company agrees to provide either white uniforms or tunics and slacks to The bakery and lunch employees.

ARTICLE 12- SENIORITY RESPECTING PROMOTIONS

The Company will continue to post jobs as is the present practice in the stores.

DEMOTIONS - The store manager or supervisor will ask the employee if he/ she wants the steward present at the stage where the employee is being told that absent improvement he/she will be demoted and will honor the employee's desire. The steward will be present at the time of demotion.

ARTICLE 14- STEWARDS

The Company agrees to continue the present practice for Union Representatives to be excused from work for Union business.

ARTICLE 17- MISCELLANEOUS

PROVISIONS

SECTION 6 - The Company will be sensitive to the Union's interest in having bulletin boards in conspicuous places.

SECTION 7B - The Company will not make any transfers which circumvent the Purpose of this language.

FURTHER SIDE AGREEMENTS CONCERNING ARTICLE 17:

1. The Company agrees to abide by The

Schmit-Woodman Agreement (Union and Company agreement) any Union member training for a management position cannot discipline an employee until promoted.

2. The Company also agrees to abide by The Schmit-Woodman Agreement (Union and Company agreement) that a department head (or Union member) shall not discipline an employee,

3. Carriage duty will be assigned to packers by one (1) hour intervals and (1/2) hour intervals in inclement weather.

SPECIAL WAREHOUSE PROVISIONS

B. JOB PROMOTIONS

If a warehouse employee does not have a truck driver license he/she will be given preference for driver jobs in accordance with seniority after he/she gets a license.

F. ADDITIONAL PROVISIONS #3 -

Auditors can continue their present practice.

1. The Company will discuss any new job openings, job description and wages, if the Union doesn't like it they can grieve it.

1991 SIDE AGREEMENTS

The Union will be sensitive to the Employer's difficulties in staffing stores on Sunday and will work with The Employer to insure that this problem does not adversely affect customer service.

If the foregoing is an accurate statement of our written side agreements please sign and return one copy for my records.

Sincerely,

Richard Pires

Agreed: Russell Regan

Date: August 16, 1994

SIDE AGREEMENTS 1994
WAREHOUSE JOB SECURITY

Job Security: The Company agrees to guarantee, by name, the employees on the current full time seniority list from being involuntarily laid off or reduced to part time for the life of the contract; (except as allowed under paragraph b below) except to the extent that circumstances beyond the control of the Company make it physically impossible to maintain the existing level of operations at the East Bridgewater Distribution Center facility. The parties agree that the attached seniority list is the applicable list for the purposes of this agreement.

a. If Tobacco or Repack leaves the East Bridgewater Distribution Center the Company agrees to create an equal number of Full Time Porter job positions or preferred jobs at the applicable rate of pay, at the time it leaves.

b. Thirty four (34) named junior employees can be reduced 325 hours, per year, for the first two years of the contract. These employees will receive the applicable full time hourly wages and benefits. Said employees may use vacation time and personal days to supplement lost time. In the third year of the contract the thirty-four (34) reduced hour employees will be moved to the list of protected full time employees, by name, at forty (40) hours a week. The Company will also allow the use of voluntary time off (V.T.O.), vacation time and personal days, by other employees, as a substitute to reducing said employees hours in a particular week. The Company agrees to promote one of the 34 employees, subject to this subparagraph based on seniority, to protected full time status to replace each incident of attrition including but not limited to the following: (death, voluntary quit,

transfer permanent disability or illness), at The East Bridge Water Distribution Center.

The following provisions shall apply to the reduction of hours:

1. (25) Senior named employees may have their hours reduced 27 times per year, up to 12 hours per week (9) remaining named employees may have their hours reduced 20 times per year, up to a maximum of 16 hours. This reduction will be done by inverse seniority. (list attached)

2. Once an employee has had the maximum amount of hours reduced he will maintain a forty (40) hour work week schedule for the rest of the contract year.

3. The Union will be given the hours to be reduced by day, and by week, two weeks in advance.

4. The affected employees will be notified one week in advance.

5. The Employer may backfill any of these thirty four (34) reduced hour full timers, provided it is to replace a promoted reduced hour full-timer or to replace an injured reduced hour full timer. (New)

2. The Employer and the Union agree to develop with the assistance of an outside consultant, a gain sharing program for the East Bridgewater Distribution Center. This program will be calculated to produce a reasonably attainable goal that would generate payments of $500.00 or more per distribution center employee, in July 1995 and July 1996 based on an agreed upon percentage savings achieved in areas of controllable expenses, including but not limited to, damages, supplies maintenance costs, workers compensation expenses and picking errors. In the event the parties are unable to mutually agree on terms of a plan the matter may be submitted to last best offer arbitration in which the arbitrator will determine which of the parties final

positions is more reasonable. Any arbitration under this procedure must be completed by December 31, 1994.

JOINT LABOR MANAGEMENT COMMITTEE

3. The Company and the Union agree to formulate a Joint Labor Management Committee. This committee will be comprised of representatives from the Company and the Union. The primary goal of this committee is to involve the employees in the decision making which affects their working lives and for the mutual benefit of the employees and the employer.

PROGRAM OBJECTIVES

1. To improve the communication between labor representatives and company management;

2. To enhance the involvement of workers in making decisions that affect their work lives;

3. To provide workers and employers with opportunities to explore innovative approaches to improving company competitiveness;

4. To identify and solve problems of mutual interest;

5. To generally improve communication between workers and managers, and

6. To improve the working conditions and work to meet the workers' needs whenever possible.

PROGRAM STRUCTURE

1. There shall be an equal number of representatives from both the Company and the Union.

2. The committee shall be composed of a total of no less than six committee members.

3. Members of The JLMC on The Union side shall

be appointed and or removed by the President and the Warehouse Vice President of UFCW Local 791.

4. The committee shall meet initially on a monthly basis and future meeting schedules will be determined by the JLMC.

5. Members of both management and the membership may submit issues to the committee for discussion.

6. All issues that are discussed by the committee will be addressed based on a majority vote of the JLMC, by the process of a secret ballot.

7. The committee shall be task orientated and all expenses incurred while working on the selected task shall be paid by the Company with, approval of the JLMC.

8. If the Company and the Union feel at any time that all issues brought before the JLMC are not given equal and fair consideration then either party reserves the right to withdraw from the JLMC.

OUTSIDE SERVICES

4. The Joint Labor Management Committee is to review all labor oriented jobs currently under contract at East Bridgewater Distribution Center. The Employer will consider proposals to assign contracted work to bargaining unit Employees if the Union demonstrates that it is economically feasible and that bargaining unit Employees are capable of performing work satisfactorily.

COMPLIMENTARY OVER TIME

5. Nothing in this agreement will be interpreted to require offering overtime work at the end of a shift as a condition for calling some employees for overtime prior to

BEST AVAIL A

the start of their shift (so called "complimentary overtime").

HIGHER EDUCATION

6. The company will provide curriculums from local colleges and will look for courses suitable for the employees a EBDC. There will be an appeal process for anyone who is denied tuition reimbursement. This will be decided between the Vice President of operations and the warehouse Vice President of Local 791 U.F.C.W This provision will be subject to grievance and arbitration in cases where the Union contends that approval has been discriminatory denied.

ABSENTEEISM POLICY

7. Paid sick days will not be counted against absence as a general policy except in the case of patterning, and special circumstances. The rules will be developed in the JLMC.

SAFETY.

8. All issues of safety will be addressed through the Partnership with the Union Committee of Work Related Injuries.

RECALL

9. The present recall list will be extended for the life of the contract with these modifications.

a. Physical - Employee must pass a standard physical.

b. The right of laid off full timers to refuse temporary part time and temporary full time work. Laid

E COPY

off part time Employees may not refuse permanent part time.

c. 90 day probationary period for both the warehouse and the stores, if an employee does not perform satisfactorily he/she may be terminated.

STORE JOB SECURITY

10. The employer agrees that no full-time employee who is on the full-time store seniority list as of July 31, 1994 (list attached) will be involuntarily laid off or reduced to part time during the life of the 1994-1997 Agreement, unless more than two (2) union stores are closed during the life of the Agreement, in which case the Employer may lay off; or reduce to part time, the total number of full-time employees who were working in the union stores which were closed.

BENEFIT MODIFICATIONS

11. Shaw's and Local 791 have discussed the following modifications in benefit programs provided by Shaw's employees covered by the collective bargaining agreement and that Local 791 has confirmed that it has no objection to the implementation of the following benefit modifications:

(1) Special Joint and Survivor Annuity for Married Member: A married member who retires or terminates employment after July 31, 1994 may elect to receive the monthly payments on the basis of Special Joint and Survivor Annuity. The Special Joint and Survivor Annuity shall have all of the provisions of The Qualified Joint and Survivor Annuity described in Section 6W 6(a) with the additional provision that in the event that, after the annuity Starting Date, the Member's spouse shall

predecease the Member, the monthly annuity payable to the Member shall then be increased to be the amount which would have been payable monthly if the member had initially elected to receive his benefits on a single life basis.

(2) The cost of prescription drugs in network will be increased to $5.00/$ 10.00 effective January 1, 1996. Cost of mail order prescriptions will remain unchanged at $3.00/7.00.

(3) The Coordination of Benefits Provision will be modified to provide that no coordination of benefits will be applied to increase the total payment for services beyond the maximum provided under the terms of Shaw's Best Care.

FULL-TIME SERVICE CLERKS

12. It is not the intention of the Service Clerk to displace an existing General Duty clerk. However, the Employee does have the right to transfer General Duty Clerks to vacancies and new stores and backfill those positions. No existing General Duty Clerk will be displaced for a full-time service clerk. The full-time service clerk position performs functions store departments as follows.

BAKERY

•Service clerk will not be utilized in bakery unless three general duty clerks are assigned to the department including the manager and assistant •Do all clerk type functions •Generally do not do overnight baking, ordering, labor scheduling and reporting

DELI

• Service clerk will not be utilized-in deli unless

two general duty clerks are assigned to the department

including The manager and assistant •Primarily service customers •Stock service and self service cases •Generally do not order or perform labor scheduling and reporting functions

SEAFOOD

•Primarily service customers •Stock service and self service cases •Generally do not order or perform labor scheduling and reporting functions •In departments with no seafood manager there will be at least one full rated general duty clerk before there will be full-time service clerks

MEAT

• May perform functions not performed by meat cutters

PRODUCE

•Service clerk will not be utilized in produce unless three general duty clerks are assigned to the department including the manager and assistant •Generally do not order or perform labor scheduling and reporting functions

FLORAL

•Perform any function required in the floral department

GROCERY

•Performs stocking and shelf maintenance functions for HUC, GM, and priority sections •Priorities generally include high volume items that require restocking on less than a 24 hour cycle such as: bread; milk; soda; chips; snacks

RESCUE SQUAD

13. The following statements are a list of guidelines for the Rescue Squad that the Shaw's Management Team intends to use in the management of the squad and will make every effort to abide by.

1. The Rescue Squad will be staffed by volunteers. When an opening becomes available on the Rescue Squad, the store manager will poll their employees and employees will be assigned to the Rescue Squad on a voluntary basis senior by choice, junior by force.

2. The store that a Rescue Squad employee comes from will remain his or her home store. In the event that there is no Rescue Squad work on a given day, the Rescue Squad employee will be given an assignment.

3. If an employee on the Rescue Squad decides that they no longer want to be on the Rescue Squad, they may inform the Rescue Squad Manager of their desire to return to a permanent store, they will be permanently reassigned within 30 days to their home store or to a store not more than 20 miles from their home store and to the last position they held.

4. The regular hours for a Rescue Squad employee based on an 8 hour day will be between 6:00A.M. and 5:00 P.M. and one evening on a weekly basis. Based on a weekly placement the employee will work a normal schedule by contract.

5. Rescue Squad employees shall be paid mileage based on the difference between the distance from their home store and from their home to their daily assignment. We will compute that on a daily basis and not subtract for lesser distances. The employee can select a home store (or travel purposes and be paid mileage from that store within their district.

6. The Rescue Squad employees schedule will be posted by 1:00 P.M. on Friday if the store where they are assigned.

7. Rescue Squad personnel will be assigned to a store manager as designated by their Employer. In the event of any type of disagreement Rescue Squad personnel should deal exclusively with that store manager. In the event of any type of disagreements with their respective managers that cannot be readily resolved, Rescue Squad employees should seek out their respective Union Stewards.

8. The above guidelines do not exclude the Union or the employees from their rights under the Collective Bargaining Agreement and policies or procedures agreed to by the Company and Union.

SUNDAY WORK

14. It is recognized that adequate staffing of the stores on Sunday is in the interests of both the Employer and the Union. Therefore, employees should be encouraged to make themselves available for Sunday work.

In the event that the store manager is unable to properly staff his store for a Sunday, the Union will provide guidance and assistance to fill the unfilled shifts and schedules by encouraging employees to work.

MAINTENANCE JOB SECURITY

15. For the term of this agreement the employer will guarantee job security, by name, for all maintenance employees on the current seniority list. The Company agrees to backfill jobs in the maintenance department lost through attrition but jobs replaced will not be protected in the job security clause. (list attached)

16. The Company agrees to follow its current practice in regards to additional work for maintenance

department personnel, but the Union acknowledges that there may be times when an outside contractor must be called upon because of safety, technical knowledge and timing.

United Food and
Shaw's Supermarkets Inc.
Commercial Workers Local Union 791
AFL-CIO, CLC

	1994yr	1995yr	1996yr
MEAT DEPARTMENT	837	837	837
2nd Person In Meal Dept	779	779	779
Meat Cutter	764	764	764
Apprentice Meat Cutter	406	406	406
After 3 months	435	435	435
After 6 months	465	465	465
After 9 months	495	495	495
After 12 months	550	550	550
After 15 months	605	605	605
After 18 months	764	764	764
General Wage Increase	30		
PRODUCE DEPT HEAD*	782	782	782
Produce Second Man	$15/over	$15/over	$15/over

DELI DEPT HEAD*	$40/over	$40/over	$40/over
BAKERY DEPT HEAD*	$40/over	$40/over	$40/over
FISH/LUNCH DEPT. HDS*	$20/over	$20/over	$20/over
COMBINED FISH & DELI DEPT. HEAD*	$50/over	$50/over	$50/over

Applicable to sickness or vacations or 4 consecutive days to include manager's day off.)

F.T. MGNT. TRAINEE	$28/over	$28/over	$28/over
CHECK OUT MANAGER*	$66/over	$66/over	$66/over
GROCERY MANAGER*	$66/over	$66/over	$66/over
RELIEF MANAGER	$66/over	$66/over	$66/over
CREW CHIEF	$40/over	$40/over	$40/over
ASSIST. CREW CHF SRO	$15/over	$15/over	$15/over
F.T. SVC. DESK MGR.	$30/over	$30/over	$30/over

*Denotes classificatons which receive a $30 wage increase

for 1994. All other full time general duty clerks and classified positions will receive a $25 increase for 1994.

FT GENERAL DUTY CLERK & FULL TIME RECLAIM CENTER
(Hired before 7/31/94)

	1994yr	1995yr	1996yr
After 30 days	406	406	406
After 4 months	431	431	431
After 8 months	461	461	461
After 16 months	491	491	491
After 24 months	521	521	521
After 36 months	565	565	565

General Wage Increase 25

All full time general duty clerks above the classified rate as of 7/26/88 will maintain the existing spread over the classified rates. All employees appointed full time before July 31, 1994 who are not at the highest rate in the table as of July 31, 1994 shall receive the general wage increase added to their rate on the adjustment date. Any such increase shall be treated as an advance on their progression step until the employee's rate equals or exceeds the highest rate in the table. The rates in this scale will apply to employees who continue to hold positions as full time night time floor cleaners which they assumed on or before July 26, 1991.

	1994yr	1995yr	1996yr
FULL TIME GENERAL DUTY CLERKS (Hired after 31, 1994)			
Start	320	320	320
After 3 months	330	330	330
After 6 months	345	345	345
After 12 months	365	365	365
After 18 months	395	395	395
After 24 months	420	420	420
After 30 months	450	450	450
After 36 months	480	480	480
After 42 months	525	525	525
After 48 months	565	565	565
FULL TIME SERVICE CLERK EMPLOYEES			
Start	260	260	260
After 6 months	280	280	280
After 12 months	300	300	300

After 18 months	320	320	320
After 24 months	340	340	340
After 30 months	360	360	360
After 36 months	380	380	380

General Wage Increase $20

Full time employees. Including classified employees, general duty clerks, service clerks, primary floor care, full time secondary floor care employees, and full time packers and porters who are at or above the highest rate in the table effective July 30, 1995 will receive a lump sum bonus of twelve hundred dollars ($1,200.00) as standard payroll deductions.

Full time employees including classified employees, general duty clerks, service clerks, primary floor care, full time secondary floor care employees, and full time packers and porters who are at or above the highest rate in the table effective July 28, 1996 will receive a lump sum bonus of twelve hundred dollars ($1,200.00) as standard payroll deductions.

P.T. STORE EMPLOYEES	1994yr	1995yr	1996yr
(to include part time cafeteria) AND ALL PART TIME RECLAIM CENTER EMPLOYEES			
Start	$4.50	$4.50	$4.50

After 6 months	$4.80	$4.80	$4.80
After 12 months	$5.00	$5.00	$5.00
After 18 months	$5.20	$5.20	$5.20
After 24 months	$5.60	$5.60	$5.60
After 30 months	$6.00	$6.00	$6.00
After 36 months	$6.40	$6.40	$6.40

General Wage Increase $0.25

All part time store employees hired before July 31, 1994 who are not in the highest rate in the tables as of July 31, 1994 shall receive the general increase added to their rate on the adjustment date. Any such increase shall be treated as an advance on their next progression step until the employee's rate equals or exceeds the highest rate in the table.

	1994	1995	1996
PART TIME PACKERS & PORTERS			
(Hired after 7/26/91)			
Start	$4.40	$4.40	$4.40
6 months	$4.50	$4.50	$4.50
12 months	$4.80	$4.80	$4.80
18 months	$5.00	$5.00	$5.00

Minimum Increase $0.15

All part time packers and porters hired before July 31,1994 who are not in the highest rate in the tables as of July 31, 1994 shall receive the general increase added to their rate on the adjustment date. Any such increase shall be treated as an advance on their next progression step until employee's rate equals or exceeds the highest rate in table.

All part time store employees who are on or above the highest rate in the table effective July 28,1996 will receive a lump sum bonus of five hundred dollars ($500.00) as standard payroll deductions.

All part time store employees who are on or above the highest rate in the table effective July 28, 1996 will receive a lump sum bonus of five hundred dollars ($500.00) as standard payroll deductions..

All part time packers and porters who are on or above the highest rate in the table effective July 30, 1995 will receive a lump sum bonus of two hundred and fifty dollars ($250.00) as a standard payroll deduction.

All part time packers and porters who are on or above the highest rate in the table effective July 30, 1996 will receive a lump sum bonus of two hundred and fifty dollars ($250.00) as a standard payroll deduction.

	1994	1995	1996
PT. FLOOR PERSON	$40/over	$40/over	$40/over
HEAD SERVICE DESK PERSON			

All part time store employees hired before July 31, 1994 who are not in the highest rate in the tables as of July 31, 1994 shall receive the general increase added to their rate on the adjustment date. Any such increase shall be treated as an advance on their next progression step until the employee's rate equals or exceeds the highest rate in the table.

BEST AVAIL

	1994	1995	1996
PART TIME PACKERS & PORTERS			
(Hired after 7/26/91)			
Start	$4.40	$4.40	$4.40
6 months	$4.50	$4.50	$4.50
12 months	$4.80	$4.80	$4.80
18 month's	$5.00	$5.00	$5.00
Minimum Increase	$0.15		

All part time packers and porters hired before July 31,1994 who are not in the highest rate in the tables as of July 31, 1994 shall receive the general increase added to their rate on the adjustment date. Any such increase shall be treat as an advance on their next progression step until employee's rate equals or exceeds the highest rate in table.

All part time store employees who are on or above the highest rate in the table effective July 30, 1995 will receive a lump sum bonus of five hundred dollars ($500.00) as standard payroll deductions.

All part time store employees who are on or above the highest rate in the table effective July 28,1996 will receive a lump sum bonus of five hundred dollars ($500.00) as standard payroll deductions.

All part time packers and porters who are on or above the highest rate in the table effective July 30, 1995 will receive

All part time packers and porters who are on or above the highest rate in the table effective July 30, 1996 will receive a lump sum bonus of two hundred and fifty dollars ($250.00) as a standard payroll deduction.

	1994	1995	1996

E COPY

PT. FLOOR PERSON $ 40/over$40/over$40/over
HEAD SERVICE DESK PERSON
PART TIME $50/over $50/over $50/over
Part time store employees who are receiving a service desk clerk premium as of July 31, 1994 will have their wage rate increased by an additional $.40 effective July 31, 1994.
PART TIME NIGHT & EARLY MORNING
STOCKING DIFFERENTIAL
After 11:00 PM and
before 7:00AM $0.70 $0.70 $0.70

When an employee takes the place of meat, produce deli, seafood, grocery, cafeteria bakery department head, a crew chief, SRO, front end manager service desk manager or primary floor cleaner for four consecutive days, including the department head's day off, he/she shall receive the department head's pay for such time worked. A meat cutter will be allowed to step up to the position of second person or department head in their absence and shall receive the applicable rate of the person replaced for such time worked provided that such replacement is for four (4) consecutive days or more, including the second person or department head's day off.

FULL - TIME NIGHT STOCKERS

Hired or appointed prior to 7/27/82 70 cents per hour premium for all hours worked including Monday inventory provided all other hours are night stocking
Hired or appointed after *7/26/82* - 62.5 cents per hour premium for hours worked between 11.00 P.M. and 7.00 AM.

1994 1995 1996

PRIMARY FLOOR CARE

(One per Store)

Start	380	380	380
8 months	400	400	400
16 months	420	420	420
24 months	440	440	440
36 months	535	535	535
General wage Increase	$25		

SECONDARY FLOOR CARE & MEAT ROOM

CLEANER (Full or part time) & FULL TIME PACKERS & PORTERS

Start	$7.00	$7.00	$7.00
8 months	$7.25	$7.25	$7.25
16 months	$7.50	$7.50	$7.50
24 months	$8 00	$8.00	$8 00
36 months	$9.80	$9.80	$9.80

General Wage Increase-P.T. $0. 25 Full Time $25.00

Holiday vacation, sick pay and funeral pay for full time and part time right stockers will be calculated on the basis of the regular rate plus night premium.

Night premium for all employees except grocery night stockers full time floor cleaners and full time or part time night cleaners listed as part time store employees, who work more than two (2) consecutive hours between the hours of 11.00 P M. and 7:00 A.M. shall receive 62.5 cents per hour premium for all hours worked between 11:00 P.M. and 7:00 A.M.

WAREHOUSE	1994	1995	.1996
GENERAL WAREHOUSE, CIGARETTES			

WASHER /SCRUBBER & FULL TIME PORTERS HIRED PRIOR TO JULY 31, 1994

Start	$12.30	$12.30	$12.30
After 6 months	$13.10	$13.10	$13.10
After 12 months	$13.00	$13.80	$13.80
After 18 months	$14.80	$14.80	$14.80
After 24 months	$15.80	$15.80	$15.80
After 30 months	$16.80	$16.80	$16.00
After 36 months	$18.40	$18.40	$18.40

All active warehouse employees will receive a $1000 bonus the first year of the contract Gain Sharing the second and third years of the contract.

RECEIVER, FORK & SLIP SHEET, SHIPPER

Start	$12.45	$12.45	$12.45
After 6 months	$13.25	$13.25	$13.25
After 12 months	$13.95	$13.95	$13.95
After 18 months	$18.55	$18.55	$18.55
PART TIME PICKERS			
Start	$12.15	$12.15	$12.15
After 6 months	$13.15	$13.15	$13.15
After 12 months	$14.15	$14.15	$14.15
After 18 months	$15.15	$15.15	$15.15
PORTERS - HIRED AFTER JULY 31, 1994			
Full Time	$17.00	$17.00	$17.00
(Shift differential starting after 12 noon)	0.35	0.35	0.35

	1994	1995	1996
GENERAL STORE MAINTENANCE			
Start	$11.50	$11.50	$11.50
After 8 months	$18.80	$19.05	$19.30
STORE MAINTENANCE REFRIGERATION AND/OR ELECTRICAL			

Start	$12.50	$12.50	$12.50
After 6 months	$19.80	$20.05	$20.30
GENERAL MAINTENANCE			
Start	$11.50	$11.50	$11.50
After 6 months	$18.80	$19.05	$19.30

MAINTENANCE REFRIGERATION AND / OR ELECTRICAL			
Start	$12.50	$12.50	$12.50
After 6 months	$19.80	$20.05	$20.30
GENERAL MAINTENANCE			
Start	$11.50	$11.50	$11.50
After 6 months	$18.80	$19.05	$19.30
LEAD MAINTENANCE	$20.80	$21.05	$21.30
MAINTENANCE REFRIGERATION AND / OR ELECTRICAL			
Start	$12.50	$12.50	$12.50
After 6 months	$19.80	$20.05	$20.30

If any maintenance apprentices are hired/all non apprentice employees will receive a lump sum bonus to be paid quarterly, calculated in an amount equal to $.10 an apprentice for each first year apprentice, $. 15 an apprentice for each second year apprentice and $.20 an apprentice for each third year apprentice for each hour worked by the non apprentice employees in that quarter. Full time and part time seasonal employees will be paid accordance with Article 19. Section 4-F-15

SEPTEMBER 27, 1994

NO.	NAME	WHSE FULL-TIME
1	Belmore, Gerald M.	04-12-63
2	Welch Richard E.	06-10-63

3	Brown, Kenneth R	01-29-69
4	Jutras, Ernest E.	02-03-69
5	Stetson Charles P.	03-31-69
6	Erickson, Robert P.	08-11-69
7	Miller, Richard E.	08-19-69
8	Julius Dale	09-15-69
9	Porter, David W.	11-03-69
10	Andrews, Richard A.	12-22-69
11	Newcomb, Roger S.	01-05-70
12	Willis, Richard E.	02-03-70
13	Yaffe, Howard S.	02-23-70
14.	Ruscella, Richard G.	01-01-70
15	Johnson, Donald	11-16-70
16	Perkins, Lee E.	05-03-71
17	Huston, Ernest M.	12-20-71
18	Staff, David R.	01-24-72
19	Ludwig, Michael E.	04-17-72

NO.	NAME	WHSE
FULL-TIME		
20	Regan, Russell F. (L. .O.A.)	04-24-72
21	Moranville, Edward J.	05-01-72
22	Mastropetro, Augustine E.	05-22-72
23	Reese, Donald R.	06-18-72
24	Gallagher, Harry G	07-17-72
25	Mandevtie, Leonard F.	07-17-72
26	Ostiguy, Anthony W.	08-07-72
27	Lemmo, David C.	08-10-72
28	Tibbells, Joseph H.	08-21-72
29	Duquette, Wayne	09-04-72
30	Ames, Thomas E.	09-13-72
31	Hutchke, Michael	09-18-72
32	Pomeroy, Curtis J.	10-10-72
33	Farley, Bruce P.	10-10-72
34	Fox, Michael A. (L.O.A.)	10-10-72

Bumham, Gary (L.O.A.)	10-12-72
Galligan, John H.	10-23-72
Larson, Walter	11-06-72
Washburn, George R.	12-04-72
Barra, Richard	01-15-73
Renaud, James M.	02-05-73
Demoura, Joseph S.	03-12-73
Henderson, Donald R.	04-23-73
Butrick, Rick J.	06-15-73
Schmitt, James (L.O.A.)	08-07-73
Vodden, William E.	08-07-73
Hennen, Bruce A.	09-24-73
Deligolia, Robert H	10-29-73
Lincoln, David P.	02-02-74
Davis, Gregory	02-25-74
Yonitis, Michael J.	05-28-74
Enos, JosephF.	06-17-74
McNeil, George L.	06-20-74
Bellevue, Joseph J.	08-06-74
Bordeauix, T imothy E.	08-26-74
Intoppa, Joseph G.	09-02-74
Cannizzaro, Frank G.	09-23-73
Gomes, Donald A.	09-23-74
LaBelle, Terrance A.	10-18-74
Dotzenrod, Charles F.	10-29-74
Clark, Robert	11-03-74
Roscoe, Robert W.	12-16-74
Morochnick, Steven	06-04-75
Donahue, James L.	08-19-75
Barnard, Samuel R. Jr.	12-05-75
Chaves, John M.	01-03-76
McClay, Robert J. (L.O.A.)	01-11-76
Anderson, Bruce	08-03-76
Lawson, Scott A.	11-10-76
Chaves, Antonio	04-10-77
Ortenzl, Roger D.	06-13-77

71	Porter, Donald D.Jr.	06-20-77
72	Watson, Donald F.	06-20-77
73	Anthony, Thomas J.	06-21-77
74	Ludwig. Mitchell E.	06-26-77
75	Pauley, William R.	06-28-77
76	Vacca, Nicola A.	07-13-77
77	Osgood, David A.	08-08-77
78	Guarino, Joseph L. Jr.	08-13-77
79	Dupuis. Dennis L.	08-13-77
80	Churchill, Paul	09-13-77
81	Ferriera, Robert A.	10-01-77
82	Howell, Roy	11-02-77
83	Gomes, Joseph.	11-16-77
84	LaRosa, Frank M.	11-21-77
85	Holmes, Dennis M.	12-22-77
86	Leal, Henry F. Jr.	12-26-77
87	Bumap. Edward A.	02-21-78
88	Lynds, William	03-06-78
89	Tardie, William J.	03-09-78

NO.	NAME	WHSE
FULL-TIME		
90	Robillard, Daniel J.	06-07-78
91	Healy, Joseph R.	06-08-78
92	Nule, Gerald F.	07-08-78
93	Doherty, Mark G.	09-20-78
94	French, Glenn A.	09-20-78
95	Alden, Terrance L.	01-02-79
96	DeChristopher, Robert L.	01-04-79
97	Morrsion, Peter L.	01-14-79
98	Chase, Dana G. Jr.	01-15-79
99	Polednick, Frederick R.	01-15-79
100	MacLeod, MarkW.	02-01-79
101	Sarnuelson, Andy R.	02-19-79
102	DiSalle. Robert M.	02-22-79
103	West, Eric M.	03-02-79
104	Horsman, Michael E.	03-08-79
105	Richardson, John S.	03-24-79

106	Sprout, Russell E.	03-24-79
107	Miles, Timothy F.	03-31-79
108	Thomas, Robert P. Jr.	03-31-79
109	Anacki, Andrew A. Jr.	04-27-79
110	Hefferman, William A.	05-15-79
111	Barone, Michael L.	05-19-79
112	Sirrico, Wayne F.	05-28-79
113	Thomas, Melvin E.	06-01-79
114	Robertson, Harold R.	06-06-73
115	Keith, John R.	06-08-79
116	Sellars, Mark D.	06-18-79
117	Palva, Edward R.	06-28-79
118	Galvin, Norman	08-09-79
119	Brown, Robert Jr.	08-31-79
120	Young, Wayne D.	09-28-79
121	Stinchfield, Arthur C. C.	10-24-79
122	Burke, Patrick J.	01-21 -80
123	Cratty, Thomas R.	02-06-80
124	Franzen, John C.	02-08-80.

NO.	NAME	WHSE
FULL-TIME		
125	Maloney, Frederick J.	03-03-80
126	Campbell, Donald F.	03-24-80
127	Souza, Antonio F.	03-30-80
128	Voci, Richard R.	04-11 -80
129	Silvia, Mark A.	04-14-80
130	Kelliher, David E.	04-16-80
131	Clapp, Dean A.	04-26-80
132	Stork, David R.	05-01-80
133	Frost, David F.	05-17-80
134	Berg, Christian D.	08-11-80
135	Legault, Alfred A.	08-21-80
136	McGalligan William J. Jr.	08-25-80
137	Davis, Roberl Jr.	09-19-80
138	Sheehan, Stephen M.	10-02-80
139	Hayden, William S.	11-19-80
140	Dole, Davld M..	11-21-80

141	Lundgren, Robert	12-26-80
142	Costello, Anthony J.	01-04-81
143	Goulston, Todd A.	01-28-81
144	Allen, Donald	02-26-81
145	Noone, David M.	04-24-81
146	Henault, John E.	05-11-81
147	Harlow, Chris A.	06-01-81
148	MacDonald, Raymond L.	06-03-81
149	Nevitt, Mark S.	06-24-81
150	Pinardi, James R.	07-01-81
151	Mehil, William L.	07-22-81
152	Lemoing, John L. III	01-23-81
153	Clark, Alan A.	01-24-81
154	Anderson, Robert D.	08-09-81
155	Flaschetti, James F.	08-17-81
156	Rudy, Joseph E.	08-26-81
157	Consolo, William C.	11-20-81
158	Her, Paing Ying	12-05-81
159	Murphy, Michael J.	12-29-81
NO.	NAME	WHSE
FULL-TIME		
160	McIsaac, Mark	02-25-82
161	Eaton, James S.	03-07-82
162	Machado, Leon O.	04-28-82
163	Georgantas, George D.	08-11-82
164	Tatro, Raymond J. Jr.	12-24-82
165	Kilby, Thomas	12-30-82
168	Pineau, Donald J.	01-21-83
167	Strollo, William N.	02-03-83
168	Cahoon, Kenneth W.	02-11-83
169	Travers, Mike	02-15-83
170	Murphy, Sean H.	03-23-83
171	Bernadino, Kerry J.	06-19-83
172	Derouen, Peter M.	02-14-84
173	Cormier, Garrett M.	03-06-84
174	Rebello, Mark A.	04-08-84
175	Schmidt, Edward J.	12-06-84
176	Snell, Dana	01-04-85

177	Look, Kenneth P.	05-20-85
178	Prell, JohnV.	06-09-85
179	Welterholm, Jay F.	06-11-85
180	Orr, Richard A.	06-13-85
181	LaCrosse, Gary D.	06-17-85
182	Silva, Steven R.	06-18-85
183	Kelley, Kevin J.	06-23-85
184	McGaughey, John R.	06-23-85
185	MacKay, Michael W.	06-25-85
186	Plantoni, John M.	07-24-85
187	Smith, Mark	08-19-85
188	Cole, John E.	12-24-85
189	Willis, Robert L..	01-10-86
190	Britton, Walter R.	01-12-86
191	McKay, John R.	01-12-86
192	Hayes, Edward	01-13-86
193	MacLean, James R.	01-14-86
194	Bolle, Jack	01-20-86

SHAW'S SUPERMARKETS, INC.
ASSOCIATE HANDBOOK
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WORKING TOGETHER

Introduction

Shaw's is part of the food distribution industry and in the food distribution industry customer service is very important. Thus Shaw's recognizes that its strength is in associates who have a strong interest in providing prompt, courteous and efficient service to our customers.

We also recognize that the employer/employee relationship is not just a casual one. An associate comes to a company looking to satisfy certain needs. These needs may include income, an interest in the type of business being conducted or job prestige. The company, by the same token is looking for people to do all the various things that running a business requires. The company and the associate both benefit when this relationship is clearly understood in that it usually leads to productive work solid income, job security and growth for the future.

Every company has rules which govern everyone's conduct within the company. These rules enable everyone to function more efficiently so that the company runs like a well-trained team. You may find your early days here at Shaw's a little easier if you know what you can expect from us and what in turn, we expect of you. The rest of this section of the Handbook spells this out in a large organization like Shaw's, it's important for people to have common rules of operating; without them we cannot maintain the same high standards in every store.

Once people understand what's expected, most of them will live up to their commitments. Those who don't,

should either change or leave because a team can't afford to have players who won't play by the rules.

Throughout this section you will see phrases marked "DO's and DON'Ts." They are not mere suggestions. They are statements of what is expected of you. They are rules by which the Shaw's team plays, and it's up to you to understand and live by these rules. If you do, Shaw's will be an efficient, satisfying place to work.

EQUAL OPPORTUNITY

It is the policy of Shaw's Supermarkets, Inc. to recruit, hire, train and promote regardless of race, color, religion, sex, age, national origin, physical disability or any other factor prohibited by law. Those forms of discrimination prohibited by law will not be tolerated toward any associate.

PERSONNEL POLICIES

Absenteeism Policy

If an associate is absent from work for an extended period of time (such as in the case of a severe illness or injury), the associate will be terminated six months from the last day worked for part-time associates and one year from the last day worked for full-time associates. This policy does not affect any worker's compensation benefits, but will end other company-paid associate benefits.

Any associate terminated under this policy whose absence resulted from a work-related injury shall be entitled, upon request, to reinstatement to the associate's former position if the position is available and suitable to his/her physical condition, and if the associate is then qualified for employment in such position. If that position is not available or suitable, the associate is entitled, upon

request, to reinstatement to any other available position for which the associate is then qualified and which is suitable to the associate's physical condition. Shaw's will attempt when possible to reasonably accommodate that associate's physical condition in any available position for which the associate is then qualified. Any associate reinstated under this policy shall have seniority rights computed on the aggregate amount of time worked both before and after any break in service caused by a work-related injury.

Those associates absent with a work-related injury who have been terminated under this policy may choose to purchase at their own expense the group insurance benefits provided by Shaw's. Those individuals may continue to purchase the group insurance benefits until such time as they may receive lump-sum worker's compensation settlement or have obtained employment with another employer.

MASSACHUSETTS WORKERS' COMPENSATION

M.G.L. chapter 152 § 75A. Preferences for hiring

Any person who has lost a job as a result of an injury compensable under this chapter shall be given preference in hiring by the employer for whom he worked at the time of compensable injury over any persons not at the time of application for reemployment employed by such employer; provided, however, that a suitable job is available. Actions may be filed under this section with the superior court department of the trial court for the county in which the alleged violation occurred. An employer found to have violated this section shall be exclusively liable to pay to the employee lost wages, shall grant the employee a suitable job, and shall reimburse such reasonable attorney fees incurred in the protection of rights granted by this section as shall be determined by the court.

In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement or chapter thirty-one, the collective bargaining agreement or said chapter thirty-one shall prevail. Added by St.1985, c. 572, § 58.

MASSACHUSETTS WORKERS' COMPENSATION

M.G.L. chapter 152 § 75B. Qualified handicapped persons; discrimination against employees exercising rights under this chapter.

(1) Any employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter one hundred and fifty-one B.

(2) No employer or duly authorized agent of an employer shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by this chapter, or who has testified or in any manner cooperated with an inquiry or proceeding pursuant to this chapter, unless the employee knowingly participated in a fraudulent proceeding. Any person claiming to be aggrieved by a violation of this section may initiate proceedings in the superior court department of the trial court for the county in which the alleged violation occurred. An employer found to have violated this paragraph shall be exclusively liable to pay to the employee lost wages, shall grant the employee suitable employment, and shall reimburse such reasonable attorney fees incurred in the protection of rights granted as shall be determined by the court. The court may grant whatever equitable relief it deems necessary to protect rights granted by this section.

MASSACHUSETTS WORKERS' COMPENSATION
M.G.L. chapter 152 § 75B (3)

(3) In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail. An employee may not otherwise waive rights granted by this section.

Added by St.1985, c. 572, § 58. Amended by St.1986, c. 662, § 49.

FEDERAL STATUTES

29 U.S.C. § 185. Suits by and against labor organizations.

(a) venue, amount and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

28 U.S.C. § 1445 Nonremovable actions

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

SUP. CT. U.S.
FILED
JUL 10 1997
OFFICE OF THE CLERK

No. 96-1965

In The

Supreme Court of the United States

October Term, 1996

THERESA MARTIN,

Petitioner,

vs.

SHAW'S SUPERMARKETS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DUANE R. BATISTA
Counsel of Record
SHARON R. BURGER
DANIEL J. MAHONEY
NUTTER, McCLENNEN
& FISH, LLP
Attorneys for Respondent
One International Place
Boston, Massachusetts 02110
(617) 439-2000

QUESTION PRESENTED

Are a plaintiff's state law claims against her former employer pre-empted under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), (Section 301), when such claims allege violations of Massachusetts statutes the terms of which specifically provide that in the event any right set forth within them are inconsistent with an applicable collective bargaining agreement, that agreement shall prevail, and there is a real interpretive dispute about the meaning of several applicable terms of that collective agreement as applied to the facts of the case?

STATEMENT OF INTERESTED PARTIES

Petitioner is Theresa Martin.

Respondent is Shaw's Supermarkets, Inc., a wholly-owned subsidiary of J. Sainsbury (USA), Inc. which, in turn, is a wholly-owned subsidiary of J. Sainsbury, plc, the latter of which has issued shares to the public through both the New York and London Stock Exchanges.

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STATEMENT OF THE CASE

A. Statement of Facts

Respondent Shaw's Supermarkets, Inc. (Shaw's) employed Petitioner Theresa Martin (Martin) for a number of years prior to August 1994 when she stopped working as a result of a job related injury. She later applied for and received benefits under the Massachusetts Workers' Compensation Act.

Throughout her Shaw's career, a collective bargaining agreement between Shaw's and Local 791 of the United Food and Commercial Workers Union, AFL-CIO (the Union) covered Martin's positions. This collective agreement covers employees working in many of Shaw's stores in both Massachusetts and Rhode Island. In its original form, this collective agreement and its appendices comprise more than one hundred fifty pages of single spaced text, comprehensively regulating the wages, hours and terms and conditions of employment of the employees it covers.[1]

Among other things, this collective agreement grants Shaw's the "sole right . . . to hire, assign and promote Employees . . . subject only to such regulations and restrictions governing the exercise of these rights as are expressly provided in this

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1. Petitioner appended the collective bargaining agreement to her petition at pages 17a-119a. For the convenience of the Court, Respondent will cite to these appendix pages as "CBA at [page]a." Respondent notes, however, that the version of the agreement appearing in the petition's appendix does not reflect how the document appears in its original form. In fact, Respondent discovered at least one important error in Petitioner's reproduction of the agreement. The last phrase on page 76a should read "subject *only to such regulations and restrictions* governing the exercise of these rights as are expressly provided in this Agreement." (The italicized words are omitted in the reproduction.) Respondent does not attempt to verify the accuracy of all other language in the reproduction.

Agreement." (CBA at 76a as corrected, *see* footnote 1.) It also provides that in filling a "full-time clerk" position, Shaw's must give "preference" to "the senior part time Employee provided the Employee is qualified and available." (CBA at 49a.) It further provides: "The Employer shall not enter into individual agreements with Employees with respect to terms and conditions of employment." (CBA at 57a.) It also provides a grievance/ arbitration process for resolving any dispute "concerning the meaning or application of this Agreement." (CBA at 50a-53a.)

When more than a year elapsed and Martin did not return to work, Shaw's terminated her employment in September 1995, referencing collective agreement language providing that a full-time employee (such as Martin) loses her seniority if absent for more than one year because of "illness or other bona fide reason." (CBA at 47a.)[2] The Union later filed a grievance under the collective agreement contesting Martin's discharge. The Union processed this grievance through at least December 7, 1995. (Plaintiff-Appellant's Appendix to First Circuit Brief (First Circuit App.) at 148-150.)

Meanwhile, on October 19, 1995, Martin filed an application for employment with Shaw's seeking a first shift full-time clerk's position, with duties modified in accord with her doctor's restrictions, in bakery or other departments in any one of five Union represented stores. (Opinion at 3a; First Circuit App. at 143-144.) Shaw's did not rehire Martin. (Opinion at 3a.)

B. Proceedings Below

In January 1996, Martin filed a complaint against Shaw's in the Bristol County Superior Court of the Commonwealth of

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2. *See also* Opinion of the First Circuit at 2a-3a. A reproduced version of the opinion appears at pages 1a-11a of Petitioner's appendix. Respondent will use the citation form "Opinion at [page]a" to reference the opinion of the First Circuit.

Massachusetts alleging that Shaw's failure to reemploy her pursuant to her October 19, 1995 application for employment constituted (1) an unlawful denial of her right under Massachusetts General Laws Chapter 152, § 75A (§ 75A) to reemployment preference for an employee returning to work from a work related injury, and (2) discrimination against her for exercising her right to seek workers' compensation benefits in violation of Massachusetts General Laws Chapter 152, § 75B (§ 75B). In March 1996, Shaw's removed the case to the United States District Court for the District of Massachusetts and filed a motion for dismissal and/or summary judgment contending that Section 301 pre-empted Martin's claims because their resolution required interpretation of Shaw's collective bargaining agreement with the Union. Martin opposed both the removal of her case to federal court and Shaw's dispositive motions. On June 20, 1996, the District Court denied Martin's motion to remand and granted Shaw's motion to dismiss.[3]

Martin appealed to the First Circuit Court of Appeals. In an opinion by Judge Boudin, that court affirmed the dismissal on January 26, 1997. (Opinion at 11a.) In its opinion, the First Circuit cited the basic principle of *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988), that state law claims are pre-empted if they "require construing the collective bargaining agreement." (Opinion at 4a.) The court also cautioned that this *Lingle* test must be read in conjunction with the teaching in *Livadas v. Bradshaw*, 512 U.S. 107, 123, 114 S. Ct. 2068, 2078 (1994), that Section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." (Opinion at 4a.)

The First Circuit then struck the balance between this *Lingle* principle and the *Livadas* caution as applied to the unique facts

3. Martin appends the District Court's opinion to her petition at 12a-15a.

of the instant case by pointing out that the particular claims asserted by Martin were, by virtue of state law, negotiable rather than nonnegotiable. Both statutory sections in question provided that " '[i]n the event any right set forth in this section is inconsistent with an applicable collective bargaining agreement,' the agreement shall prevail." (Opinion at 6a, quoting statute.) However, this fact of negotiability was not enough in the court's view to establish pre-emption. The First Circuit held that its further duty was to read the collective bargaining agreement in light of the facts of the case to ensure there was "a *real* interpretive dispute and not merely a pretended dispute." (Opinion at 5a, emphasis in original.)

On the facts of this case, the court then determined that "Shaw's labor agreement is colorably inconsistent with Martin's state law claims," citing as "Shaw's best argument" the specific provisions in the collective agreement granting Shaw's the right to "hire, assign and promote Employees." (Opinion at 7a-9a.) Given this colorable inconsistency, the court found pre-emption because any further dispositive interpretation by any court, state or federal, would undermine the role of arbitration in interpreting the collective agreement and risk "divergent readings of the labor agreement and interference with the grievance process itself." (Opinion at 5a.)

On February 21, 1997, Martin filed a Petition for Rehearing *En Banc*, which petition the court denied on February 28, 1997.[4]

C. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1 Respondent brings the following misstatements of fact contained in the petition to the Court's attention.

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4. The First Circuit's Order appears at page 16a of Petitioner's appendix.

Petitioner refers in her petition to "Shaw's' refusal to rehire her after her recovery from her injury." (Petition at 4.) However, Martin misleads in suggesting a "recovery," as if she were without physical limitations at some point preceding her application for employment. More to the point, Petitioner also writes she "permanently injured her back," (Petition at 5), and she sought a position with Shaw's limited in accord with her doctor's restrictions on her activities.

Martin also misstates facts when she asserts: "Martin does not contest her discharge by the Company." (Petition at 5.) Martin most certainly did contest her discharge. On her behalf, her Union filed a grievance pursuant to the collective bargaining agreement, challenging Shaw's right to discharge her and seeking her reinstatement. (Opinion at 3a; First Circuit App. at 150.) Petitioner also filed a charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD), claiming Shaw's discriminated on the basis of age, gender and handicap by failing reasonably to accommodate her physical impairment, discharging her, and not rehiring her. (MCAD Case No. 96-BEM-0269.) While Petitioner's discharge and these contests about it are not the gravamen of her claims under §§ 75A and 75B, it is patently false to say she does not or did not contest her discharge.

Again at page 5 of her petition, Martin misstates argument as fact in saying: "At the time of her termination of employment, Martin lost all rights under the Collective Bargaining Agreement . . . ." The very fact that her Union filed a grievance on her behalf following her discharge reflects the inaccuracy of this statement. She retained the post-termination right under the collective agreement to grieve her discharge.

Finally, Petitioner misstates through omission when she states she "indicated on her application that, consistent with her physician's restrictions, she could work full-time as a bakery

clerk or in other store departments." (Petition at 5.) She fails to include an additional limitation that she set for herself, *i.e.*, that she work on the day shift. (First Circuit App. at 143.) Martin did not even include the substance of her physician's restrictions on her application presuming, apparently, that Shaw's knew the restrictions because she had asked for them and Shaw's had rejected them during the period of her employment. (Opinion at 2a.)

REASONS FOR DENYING THE WRIT

The Supreme Court should decline certiorari in this case because there is no conflict in the circuits created or reinforced by the First Circuit's decision below, the First Circuit properly stated the applicable rule of law, and there is no merit in other reasons advanced by Petitioner or those reasons do not rise to a level of major national issue warranting grant of certiorari.

I.

THERE IS NO CONFLICT IN THE CIRCUITS.

Martin asserts that the decisions of the First Circuit below and the Eighth Circuit in *Davis v. Johnson Controls, Inc.*, 21 F.3d 866 (8th Cir. 1994), *cert. denied*, 513 U.S. 964 (1994), are in conflict with the following five decisions in four other circuits: *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417 (7th Cir. 1995); *Gay v. Carlson*, 60 F.3d 83 (2d Cir. 1995); *Hirras v. National Railroad Passenger Corp. d/b/a Amtrak*, 44 F.3d 278 (5th Cir. 1995); *Martin Marietta Corp., Aero & Naval Systems v. Maryland Comm'n on Human Relations*, 38 F.3d 1392 (4th Cir. 1994); *Kohl's Food Stores, Inc. v. Hyland*, 32 F.3d 1075 (7th Cir. 1994). (Petition at 12-16.) The only part of this assertion with which Shaw's agrees is that the decision of the First Circuit below is consistent with that of the Eighth Circuit in *Davis*.

The holdings in *Gay, Martin Marietta, Loewen Group Int'l* and *Hirras*, are not in conflict with the First Circuit's decision below. As discussed earlier, the linchpin of the First Circuit's decision is its determination from the literal wording of the statutes themselves that the Massachusetts legislature, in enacting §§ 75A and 75B, has "*chosen* to make the substantive rights conferred by the statutes" negotiable in collective bargaining. (Opinion at 7a, emphasis in original.) By way of contrast, not only do *Gay, Martin Marietta, Loewen Group Int'l* and *Hirras not* involve §§ 75A and 75B, they do not involve any statute, regulation, or other enactment of any state that even arguably intends to make its substantive rights negotiable in collective bargaining.[5]

While the Seventh Circuit's decision in *Kohl's* involved a fact pattern closer to the instant case, there is in the final analysis no conflict between that Seventh Circuit decision and the decision of the First Circuit. The linchpin of the decision of the *Kohl's* majority panel was that the intent of the Wisconsin legislature in enacting the statute involved in that case was to make its substantive terms nonnegotiable. *See Kohl's*, 32 F.3d at 1079 ("By enacting Wis. Stat. § 102.35(3) Wisconsin has decided to impose a rule of entitlement on all employers within its jurisdiction. This entitlement is guaranteed to all Wisconsin employees."). In contrast, the First Circuit held that the Massachusetts legislature intended the terms of §§ 75A and 75B to be negotiable.[6]

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5. The Fourth Circuit in *Martin Marietta* explicitly distinguished the Eighth Circuit's decision in *Davis* on this precise ground, *i.e.*, *Davis* involved state regulation clearly intending negotiability, whereas, the state's intent in the state law involved in *Martin Marietta* was that its substantive provisions were to be nonnegotiable. *Martin Marietta*, 38 F.3d at 1400-01.

6. Indeed, the First Circuit made precisely this point with regard to § 75B in *Magerer v. John Sexton & Co.*, 912 F.2d 525, 529-30 (1st Cir.

(Cont'd)

In sum, there is nothing in the First Circuit's opinion that precludes it from deciding any or all of *Kohl's*, *Gay*, *Martin Marietta*, *Loewen Group Int'l* and *Hirras* the way the other circuits decided them, if substantially similar facts, including the same state statutes involved in those five cases, were to confront the court.

II.

THE FIRST CIRCUIT PROPERLY STATED THE APPLICABLE RULE OF LAW.

Because the First Circuit properly stated the applicable rule of law, this Court should not grant the petition for a writ of certiorari. *See* Sup. Ct. R. 10. In particular, the court below cited the basic principle of *Lingle* in conjunction with the teaching of *Livadas* in holding that Section 301 pre-empted Petitioner's state law claims. The First Circuit applied the rule of law that federal law pre-empts state law claims if they "require construing the collective bargaining agreement." (Opinion at 4a, quoting *Lingle*, 486 U.S. at 407.) The court also applied the cautionary rule that Section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." (Opinion at 4a, quoting *Livadas*, 512 U.S. at 123, 114 S. Ct. at 2078.)

Applying these properly stated rules, the First Circuit held that the invoked Massachusetts statutes, §§ 75A and 75B, expressly established negotiable rather than nonnegotiable rights for employees like Petitioner seeking rehire following on-the-job injury. The court further determined upon its review of the

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1990). (*See* Opinion at 7a.) Thus, the Massachusetts legislature had many years to amend this statute to avoid the First Circuit's interpretation if such avoidance were in fact desired.

applicable collective bargaining agreement between Shaw's and the Union that a *real* interpretive dispute existed. (Opinion at 5a-11a.) Accordingly, the court recognized that resolution of this real interpretive dispute was not within its bounds, as to entertain it would require the court to engage impermissibly in collective agreement interpretation.

The most Petitioner can really argue is that, in her opinion, the First Circuit misapplied the properly stated rule of law. She argues both that the court below misconstrues the Massachusetts statutes as creating negotiable rights and errs in seeing a real interpretive dispute in the collective bargaining agreement. Even if Petitioner were right (which she is not) the Supreme Court should not grant certiorari under these circumstances. Petitioner offers no compelling reason why the Court should review her case on a writ of certiorari — that is, why the Court should elevate from the mundane rejection to the rare exception this, at best, arguable "misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10.

III.

PETITIONER'S OTHER ARGUMENTS DO NOT WARRANT REVIEW ON A WRIT OF CERTIORARI.

Martin asserts that the decision of the First Circuit below contradicts *Livadas* and other authority in that it enables "virtually every employer with a collective bargaining agreement" to evade the reach of §§ 75A and 75B. (Petition at 16-19.) This assertion is meritless because it both misreads the First Circuit's opinion and fails to take into account the widely varying nature and scope of the terms that can and do exist in collective bargaining agreements. It misreads the opinion by ignoring the court's conclusion that, before pre-emption can be found, the trial court must carefully relate the facts of the pending case to the specific terms of the particular collective agreement

involved to ensure there is "a *real* interpretive dispute and not merely a pretended dispute." (Opinion at 5a, emphasis in original.) Since the instant case involves a refusal to hire, the First Circuit below understandably identified specific language in the collective bargaining agreement involving management's right to hire as "Shaw's best argument" for pre-emption. Indeed, the lengthy collective agreement involved in this case is an unusually sophisticated and detailed agreement carefully delineating rights and obligations of Union, employer and employees *vis-à-vis* each other, as well as rights of groups of represented employees *vis-à-vis* each other — *e.g.*, part-time compared to full-time employees; warehouse compared to store employees. Shaw's maintains there are other provisions of its collective agreement, such as the preference required to be given Union represented part-timers over rehires whose seniority has been lost (like Martin), (CBA at 49a), and the contractual prohibition against Shaw's making an individual agreement with Martin to comply with her doctor's restrictions, (CBA at 57a), that also support the First Circuit's pre-emption finding.

In contrast, there are many collective bargaining agreements whose terms are not as sophisticated and detailed as those in the Shaw's agreement.[7] The decision of the First Circuit would certainly permit a finding of no pre-emption were Martin's facts to arise under any such agreements. Finally, as the court below concluded: "the [statute] in question permits the union on behalf of its members to craft its own regime (the agreement) and in it, either to preserve or displace another regime (specified provisions of state law). Viewed in the large, there is no

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7. For example, so-called "short form" management rights clauses, unlike the Shaw's management rights clause, do not spell out the right to hire and other specific rights. *See* N. Peter Lareau, *Drafting the Union Contract*, § 2.05 at 2-28 (1996). *See also* Bureau of National Affairs, *Basic Patterns in Union Contracts* 99 (14th ed. 1995), where it is reported that only twenty-three percent (23%) of the contracts in the survey's data base contained hiring provisions.

discrimination whatever against union members; Massachusetts simply allows the union to negotiate for a different package of benefits." (Opinion at 11a.)

Martin also expresses concern about an alleged "disarray in the circuits" as to whether an asserted defense can give rise to removal. (Petition at 19-28.) The initial problem with Martin's concern is that it has no relevance to her case. An essential element of any claim under §§ 75A or 75B is that the claimed right not be inconsistent with a collective bargaining agreement. This lack of inconsistency requirement is written into the *state* law itself. Thus, it is Martin's state law claim — not any asserted defense plucked from out of the air by Shaw's — that creates the need to interpret the collective bargaining agreement. In short, even if this Court were to believe that there is any out of the ordinary "disarray in the circuits" as to when and if pre-emption can be predicated upon a defense, and further to believe that, for some reason, this "disarray" rises to the level of a pressing national problem warranting grant of certiorari, the instant case is the wrong vehicle for addressing any such "disarray."

Additionally, Martin is just plain wrong. Many of the cases cited by Martin offer garden variety holdings that a collective bargaining agreement cannot pre-empt a claim under a state statute whose provisions are *nonnegotiable*. *See, e.g., Martin Marietta*, 38 F.3d at 1400; *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). Others are cases where the court found no pre-emption because an interpretation of a collective bargaining agreement was, at most, peripheral to, rather than central to, plaintiff's claim. *See, e.g., Hirras*, 44 F.3d at 282;[8] *Loewen Group Int'l*, 65

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8. Indeed, the Fifth Circuit's *Hirras* opinion specifically reaffirmed its earlier decision in *Baker v. Farmers Electric Cooperative, Inc.*, 34 F.3d 274 (5th Cir. 1994), where, in a situation unlike *Hirras*, the court held it

(Cont'd)

F.3d at 1421. In sum, rather than being in "disarray" the circuits have been rather consistent in applying the following principles in their post *Lingle* treatment of Section 301 pre-emption claims: (1) there is no pre-emption of a claim under a state statute, constitutional provision, or regulation, the terms of which the state intends as *nonnegotiable*; however, (2) there is pre-emption of a state claim under a statute the state intends as *negotiable* or of a state tort or contract claim when the interpretation of the collective bargaining agreement is central to, rather than peripheral to, the resolution of the state claim.

Stated otherwise, Martin misreads and misinterprets relevant case law in asserting a non-existent "disarray" as to whether pre-emption can be a defense. In cases involving Section 301 pre-emption, the real issue is not offense versus defense.[9] In those cases involving claims under *negotiable* state statutes, the only real issue is whether interpreting the collective bargaining agreement is essential to resolution of the state claim.

Next, Martin asserts that the First Circuit's application of pre-emption to extinguish a state law claim of someone not covered by a collective bargaining agreement is "unprecedented." (Petition at 28-30.) First, this assertion is plainly wrong given

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could not resolve a state intentional infliction of emotional distress claim without interpreting a collective bargaining agreement to determine whether defendant employer had the right to reassign plaintiff employee different duties. *Hirras*, 44 F.3d at 283. In *Baker*, the court found pre-emption. *Baker*, 34 F.3d at 282.

9. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-94 (1987) ("The complete pre-emption corollary to the well-pleaded complaint rule is applied primarily in cases raising claims pre-empted by § 301 of the LMRA."). Where, as here, a real interpretive dispute regarding terms of a collective agreement underlies an asserted state law claim, pre-emption and removal are appropriate. (Opinion at 3a n.1.)

the precedent of the earlier decision of the Eighth Circuit in *Davis*. Second, this is *not* a case where it is clear that the collective bargaining agreement did not cover Martin at all relevant times. At the very time Martin submitted her job application upon which her state law claims rest, her Union was pursuing a grievance on her behalf, alleging her earlier discharge violated the collective bargaining agreement and seeking her reinstatement. The District Court and the First Circuit noted the existence of this grievance. (District Court Decision at 15a; Opinion at 3a.)

Finally, even assuming, *arguendo*, that the First Circuit's decision below was "unprecedented" because the collective bargaining agreement did not cover Martin at all relevant times, it does not follow that the Court should review the case on a writ of certiorari. Martin's suggestion that the First Circuit's decision "foreshadows the absurd result of applying Section 301 preemption to virtually any individual who applies for work with . . . any . . . unionized employer in Massachusetts," (Petition at 29), is itself absurd.[10] The First Circuit predicated its decision upon specific hiring language found in Shaw's collective bargaining agreement, language that is unlikely to exist in bargaining agreements of all (or even most) other unionized Massachusetts employers. (*See* footnote 7.)

Finally, Petitioner's arguments notwithstanding, the First Circuit's decision does not result in unfair prejudice to Martin or any other Shaw's employee when one considers the totality of rights involved. Fairness must be viewed from the camera angle of the entire package of rights of injured employees negotiated by Shaw's and the Union. A basic principal of the bargain struck in their collective agreement is that there should

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10. Research discloses no national epidemic of cases involving employer assertions of Section 301 pre-emption of claims of persons not covered by collective bargaining agreements.

be no distinction between the job protection rights possessed by an employee because of the happenstance that his injury happened to be occupational rather than non-occupational. Thus, employees covered by the Shaw's labor contract have extensive job protection rights for the first twelve months of any injury - protection far more expansive and favorable to the employee than that provided by any federal or state statute, including §§ 75A and 75B. However, the *quid pro quo* is that all such job protection ceases after twelve months — again regardless of whether the injury is occupational or non-occupational. Since the overwhelming majority of employees who are injured can return to work in less than twelve months, this overall bargain grants Shaw's employees, as a whole, far more rights than it takes away. This is precisely the kind of flexibility, to devise arrangements that make business sense to employers and are fair to employees, that the Massachusetts legislature intended to grant employers and unions in enacting §§ 75A and 75B, and that the First Circuit respected in its decision below.

CONCLUSION

The Court should decline certiorari in this case because the First Circuit's opinion below neither creates nor reinforces a conflict among the circuits, the First Circuit properly stated the applicable rule of law, and Petitioner's arguments lack merit or do not present the type of major national issue warranting grant of certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

THERESA MARTIN,

Petitioner,

vs.

SHAW'S SUPERMARKETS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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Petitioner Theresa Martin ("Martin"), pursuant to Supreme Court Rule 15.6, respectfully submits this brief Reply to the Brief In Opposition of Respondent Shaw's Supermarkets, Inc. ("Shaw's" or "the Company") to Martin's Petition for a Writ of *Certiorari*.[1] Martin addresses three points raised by the Respondent: (1) the First Circuit's reading of the provisos in Massachusetts' workers' compensation law to change the character of the state rights granted, so as to require pre-emption,[2] does not resolve the asserted conflicts with decisions of this Court and other circuits, it creates them; (2) the decision below misstates the law of Section 301 pre-emption; and (3) even construing the First Circuit's decision to misapply "a properly stated rule of law," Supreme Court Rule 10, Opposition at 8, *certiorari* is warranted where, as here, misapplication of Section 301 preemption denies enforceability to Massachusetts' balancing of substantive employment standards[3] with workers' rights of self-determination, and could be applied to nullify other states' similar exercise of their police powers.

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1. Martin shall refer herein to Respondent's Brief in Opposition as "Opposition," followed by the appropriate page citation; to her Petition For Writ of Certiorari as "Petition," and to the Appendix as "App."

2. In its opinion, the First Circuit states, "It is very doubtful whether, without this last-quoted proviso, Shaw's would have any plausible claims of federal preemption. Massachusetts has an independent interest in regulating injury compensation; and apart from the proviso, the elements of both Martin's state-law claims appear to be independent of bargaining agreement provisions." App. 6a.

3. Mass. Gen. L. ch. 152, § 75A ("Section 75A") grants a previously work-injured individual preference in hiring over other non-employees of the former employer. App. 122a. Mass. Gen. L. ch. 152, § 75B ("Section 75B") prohibits an employer from discriminating against an employee because of the exercise of rights under the workers compensation statute. App. 123a-124a.

FURTHER REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT IN THE CIRCUITS OVER THE REACH OF SECTION 301 PREEMPTION.

This case presents, in the words of the First Circuit, "a difficult preemption issue . . . ," App. 2a, and warrants grant of a Writ of *Certiorari* because of the compelling need to resolve enduring conflicts concerning important questions of federalism: *i.e.* the reach of Section 301 pre-emption where a state, in the exercise of its police powers, attempts "to balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment." *Fort Halifax v. Coyne*, 482 U.S. 1, 22 (1987). *See also* Supreme Court Rule 10(a). Here, the linchpin of the First Circuit's decision, and of Shaw's Opposition to this Petition for *Certiorari*, is the paradoxical assertion that, contrary to the legislature's apparent intent, Massachusetts "has . . . chosen to make the substantive rights conferred by the statutes depend upon their not being 'inconsistent' with a labor agreement." App. 7a. *See also* App. 9a (the "proviso . . . may be producing some results that the legislature did not intend"). Based on the premise that an element of the state right is the absence of an inconsistency with a labor agreement, the First Circuit thus concludes that Martin's claims for non-retaliation and for preference in hiring over other non-employees of Shaw's are preempted by the presence of a collective bargaining agreement that does not cover her, "not because the collective bargaining agreement *is* inconsistent with the state claims asserted, but because it *may* be so and requires interpretation." App. 8a-9a. Far from resolving conflicts between its decision and those of other circuits, and of this Court, the First Circuit's strained reasoning creates and perpetuates the conflicts.

Setting aside, for purposes of this Reply, cases in other circuits that arise from non-statutory state law claims[4], there is no avoiding

4. It lies beyond the bounds of this Reply to rebut point by point Shaw's attempts to distinguish the conflicting cases cited from the Second, Fourth, and Fifth Circuits. Supreme Court Rule 15. *See* Petition at 12-13, 21-24.

the conflict between the First Circuit's decision and that of the Seventh Circuit in *Kohl's Food Stores v. State of Wisconsin and Hyland*, 32 F.3d 1075 (7th Cir. 1994) (hereinafter, "*Kohl's*"), because applying the First Circuit's reasoning to the statutory language in *Kohl's* would compel a result opposite to that reached by the Seventh Circuit. *Kohl's*, 32 F.3d at 1078-1079 (holding no pre-emption). In *Martin*, the First Circuit read the Massachusetts proviso to condition the substantive rights conferred "upon their not being 'inconsistent' with a labor agreement," and imported as an element of plaintiff's case a showing based inexorably on contract interpretation. App. 7a. In *Kohl's*, Wisconsin's workers compensation statute required rehiring of a previously work-injured employee "where suitable employment is available" and where "in determining the availability of suitable employment . . . any collective bargaining agreement with respect to seniority shall govern." *Kohl's*, 32 F.3d at 1077, *quoting*, Wis. Stats. § 102.35 (3). Applied to the facts of *Kohl's*, the First Circuit's rationale would construe Wisconsin to have intended its right to rehire, as in *Martin*, to "depend upon" there being no overriding collective bargaining agreement concerning seniority — that is, in the First Circuit's view, to be negotiable — and thus to require pre-emption. But such was not the conclusion of the Seventh Circuit, *Kohl's*, 32 F.3d at 1078-1079, and *Certiorari* is warranted to resolve this conflict on the important question of the reach of Section 301 pre-emption where states grant employment protections that reference and/or defer to terms contained in collective bargaining agreements.[5]

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5. In the *Loewen Group* case cited by Petitioner, Petition at 13, 21-22, a decision subsequent to that in *Kohl's*, the Seventh Circuit expressly rejected the contention that pre-emption must follow where examination of a collective bargaining agreement is necessary to determine whether there is any inconsistency with an asserted state law right. *Loewen Group International, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (1995); *citing Allis-Chalmers v. Lueck*, 471 U.S. 202, 211; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394; *Livadas* 512 U.S. 107, 124, n.18. The Seventh Circuit emphasized,

> . . . more to the point here, merely examining the collective bargaining agreement to determine whether a

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It begs the question to deny conflict exists between the two circuits because the Seventh Circuit hinged its result on the "intent of the Wisconsin legislature . . . to make its substantive terms nonnegotiable." Opposition at 7. Indeed the First Circuit concedes the intent of the Massachusetts legislature may well have been the same. App. 9a. The statutes' respective language equally suggests the Massachusetts legislature, like the Wisconsin legislature, enacted a statute imposing "a rule of entitlement on all employers within its jurisdiction . . . ," *Kohl's Food Stores*, 32 F.3d at 1079, that provided also for employer defenses based on collectively bargained contractual obligations. Overlooked by the First Circuit, in fact the Massachusetts legislature did express its intent that the proviso to Section 75B state a waiver defense rather than "condition" the granting of the statutory right: The final subsection of the anti-discrimination provision, Section 75B(3) reads, "In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail. An employee *may not otherwise waive rights granted* by this section." Mass. Gen. L. ch. 152, § 75B(3) (emphasis added).[6] The Legislature's use of the phrases "otherwise waive" and "rights granted" belies the First Circuit's insistence on viewing the statutory right as "depending on the absence of an inconsistency," and thus "dependent" on contract interpretation for purposes of Section 301 pre-emption. *Cf. contra*, *Livadas*, 512 U.S. at 125 (contractual

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> conflict *actually* exists is not "interpreting" the collective bargaining agreement for § 301 preemption purposes. [Citation omitted].

Loewen Group International, 65 F.3d at 1423 (emphasis added).

6. The Massachusetts provisos serve also to clarify the relationship between rights granted in G. L. c. 152 and those derived from public employees' collective bargaining agreements (*see*, Mass. Gen. L. ch. 150E), and from state civil service law, Mass. Gen. L. ch. 31. *See, e.g.*, Mass. Gen. L. ch. 152, § 75A ("In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement or chapter thirty-one, the collective bargaining agreement or said chapter thirty-one shall prevail.")

waiver of state granted rights must be "clear and unmistakable," especially where state law otherwise prohibits waiver), *citing Lingle*, 486 U.S. 399, 409-410, n.9, *quoting Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

II. THE FIRST CIRCUIT'S DECISION DOES NOT "MISAPPLY A PROPERLY STATED RULE OF LAW," IT MISAPPREHENDS SECTION 301 PRE-EMPTION, THREATENS STATES' EXERCISE OF POWERS TO PROTECT THEIR CITIZENS, AND THREATENS THE DOCKETS OF THE FEDERAL JUDICIARY WITH INNUMERABLE WORKERS COMPENSATION CASES REMOVED FROM STATE COURTS.

The First Circuit does not misapply a properly stated rule of law when it holds § 301 pre-emption to apply simply because there is a "question . . . whether Shaw's labor agreement *is colorably inconsistent* with Martin's state-law claims." App. 7a (emphasis added). *See also Magerer v. John Sexton & Co.*, 912 F.2d 525, 530 (1st Cir. 1990) ("The collective bargaining agreement at issue here contains several provisions *that could be construed to govern* the conduct underlying plaintiff's . . . claim") (emphasis added). Nor is the First Circuit correct to usurp jurisdiction and extinguish Martin's state law claims,

> . . . not because the collective bargaining agreement *is* inconsistent with the state claims asserted, but because it *may* be so and requires interpretation. We could ourselves remove the doubt by interpreting the agreement one way or the other, but *this course has been foreclosed* in deference to the arbitration clause.

App. 9a (final emphasis added).

Rather, the First Circuit resists this Court's warnings not to

apply Section 301 pre-emption overbroadly or, as to represented workers, punitively, where states have exercised traditional police powers to protect citizens in matters of employment. *See, e.g., Livadas v. Bradshaw*, 512 U.S. 107, 124, *citing, Allis-Chalmers v. Lueck*, 471 U.S. 202, 213, 105 S. Ct. 1904, 1912, 85 L. Ed. 2d 206 (1985); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410, 108 S. Ct. 1877, 1883, 100 L. Ed. 2d 410 (1988); *see also Livadas*, 512 U.S. at 124, n.18, 114 S. Ct. at 2078, n.18 ("Holding plaintiff's cause of action substantively extinguished may not, as *amicus* AFL-CIO observes, always be the only means of vindicating the arbitrator's primacy as the bargained-for contract-interpreter. [Citation omitted]"); *Livadas*, 512 U.S. at 130 ("the widespread practice in Congress and in state legislatures . . . bestowing basic employment guarantees and protections on individual employees without singling out members of labor unions (or those represented by them) for disability"). As a result, the decision below conflicts not only with decisions of other Circuits, and of this Court, but is at odds with bedrock principles of federal removal jurisdiction and Congress' intent to keep federal dockets clear of workers' compensation matters. *See Caterpillar v. Williams*, 482 U.S. 386, 398-399, 107 S. Ct. 2425, 22431-2433, 96 L. Ed. 2d 318 (1987) (even where state court must interpret collective bargaining agreement "to decide whether the state claim survives," no complete § 301 pre-emption for removal purposes); 28 U.S.C. § 1445(c) ("A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States").

To decide that the Massachusetts provisos displace the source of Martin's rights from the statute to Shaw's collective bargaining agreement, so as to require complete pre-emption, moreover, turns Section 301 pre-emption on its head in a potentially far-reaching way. The workers' compensation laws of every other state within the First Circuit contain provisos that, like Massachusetts', defer to collective bargaining agreements on subjects encompassed in the state-granted rights. Thus, with respect to granted rights of "transfer to suitable work," Maine's workers compensation law provides,

> The exercise of this authority shall not conflict with any provisions of a collective bargaining agreement. . . .

Me. Rev. Stat. Ann. tit. 39, § 66-A (1996).[7] The legislatures of New Hampshire and Rhode Island, like Massachusetts', have granted their formerly work-injured citizens the right to reinstatement to their respective positions, if available, and have further provided, identically, that such reinstatement,

> . . . shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement. . . .

N.H. Rev. Stat. Ann. § 281-A:25:a (1995); R.I. Gen. Laws § 28-33-47 (1956-1996). Under the reasoning of the decision below, and in clear conflict with the Congressional intent codified at 28 U.S.C. § 1445(c)[8], the First Circuit applies Section 301 pre-emption so as to invite a deluge of removals of actions brought under the workers' compensation laws of every state within the Circuit, that fairly threatens the continued enforceability of those states' protective measures, and threatens also the already burdened dockets of the district courts and of this Court.[9]

7. Maine also provides that parties to collective bargaining may agree, *inter alia*, to "light-duty, modified job or return-to-work programs." Me. Rev. Stat. Ann. tit. 39-A, § 110.

8. 28 U.S.C. § 1445(c) provides, "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

9. Examples abound from other circuits also of state workers compensation laws that reference or defer to collective bargaining agreements on subjects such as the availability of reemployment, including light duty, to those protected by the state laws. *See, e.g.*, Conn. Gen. Stat. § 31-313 (providing for reassignment of injured workers to "other suitable full-time work in the employer's (Cont'd)

Nor is the First Circuit's decision, as Shaw's asserts, narrowly limited by an "unusually sophisticated and detailed [collective bargaining] agreement." Opposition at 10. The First Circuit's analysis requires § 301 pre-emption of claims asserted under §§ 75A and 75B whenever a "labor agreement is colorably inconsistent with . . . [the] state-law claims," App. 7a, and in this case finds a "management rights" provision to suffice. *Id.* However, management rights provisions are, in fact, commonplace in collective bargaining agreements; at least eighty percent (80%) of all labor agreements contain such provisions and at least seventy-four percent (74%) of all agreements utilize the very language that appears here — *i.e.* reserve to the employer the "sole right to manage its business."[10] *See* App. 76a. The First Circuit's decision thus

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establishment, if available; *provided the exercise of this authority shall not conflict with any provision of a collective bargaining agreement* between such employer and a labor organization. . . .") (emphasis added); Ga. Code Ann. § 34-9-243 (providing for certain reductions in weekly benefits due to be paid by employers "*[e]xcept as otherwise provided* in this Code section or *in a collective bargaining agreement*. . . .") (emphasis added); Minn. Stat. § 176.82 (requiring employers to offer continued, alternative employment to work-injured employees and providing "*the provisions of any collective bargaining agreement shall govern*" in determining the availability of such employment) (emphasis added); *also* Ark. Stat. Ann. § 11-9-505(a)(2) (same); Fla. Stat. § 440.211, Ky. Rev. Stat. Ann. § 342.277, Minn. Stat. § 176.1812, 77 Pa. Cons. Stat. § 1000.6 (all permitting collectively bargained agreements to establish binding light-duty, modified-job, and/or return-to-work programs).

10. Bureau of National Affairs, Inc. ("BNA"), *Basic Patterns In Union Contracts* 79 (14th ed., 1995) (hereinafter, "*Basic Patterns*" or "the BNA survey"). There is no relevance here to the statistic cited by Shaw's that "only twenty-three percent (23%) of the contracts in the survey's data base contained hiring provisions." Opposition at 10, n.7. "Hiring provisions," as discussed in the BNA survey, do not refer to the mere mention of hiring within overearching managements rights provisions, as here, but to separate contractual provisions setting forth preferences for local, experienced, and/or union-furnished workers. *Basic Patterns* at 99. There is no such provision in the collective bargaining agreement here. *See* App. 17a-117a.

reaches, and effectively penalizes, the vast majority of employees within Massachusetts (and arguably, as discussed *supra*, beyond the Commonwealth) who have exercised rights to participate in collective bargaining, by denying them access to state-granted protections on matters concerning reemployment and non-retaliation after receiving workers' compensation benefits. *See Livadas*, 512 U.S. at 116, 114 S. Ct. at 2074 ("A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose").

Applying federal pre-emption to Massachusetts' balancing, in §§ 75A and 75B, of its protection of its work-injured citizens with those citizens' rights to collective bargaining, thus offends the policies that animate federal labor pre-emption, penalizes employees for their exercise of federal rights, and perpetuates the "disagreements" within the Courts of Appeals, concerning Section 301 pre-emption specifically, that this Court acknowledged in *Livadas*. *See Livadas*, 512 U.S. at 124, n.18; *see also* 512 U.S. at 130 (criticizing invocations of federal pre-emption that penalize unionized employees and that force parties "to bargain for what they would otherwise be entitled to as a matter of course"); *compare*, *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 22 (1987) ("If a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption, [citation omitted], surely one that permits such bargaining cannot be pre-empted").

Because the decision of the First Circuit here conflicts with decisions of the Seventh Circuit Court of Appeals, among others, on the important matter of federal pre-emption; because it conflicts with this Court's articulation of the principles of federal labor law pre-emption of state-granted rights and the dangers of denying state protections to represented workers; and because the decision is far-reaching in its potential to oust states of jurisdiction to enforce protections granted to their citizens (and flood federal courts with removed cases brought under state workers' compensation laws), this Court should grant Martin's Petition for a Writ of *Certiorari* on this important matter of federal law.

CONCLUSION

For the reasons set forth above and in Martin's Petition, the Court should grant Martin's Petition for a Writ of *Certiorari* and summarily reverse the judgment of the First Circuit Court of Appeals, or, in the alternative, grant *Certiorari* and grant plenary review.

Respectfully submitted,

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